United States Court of Appeals

for the Second Circuit

APPENDIX

B
#1319
172

75-1180

B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RICHARD HUSS and JEFFREY SMILOW,

Defendants-Appellants.

----------x

Docket No.
75-1180

APPENDIX
VOL. 1

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- : Docket Nos. 74-2047 74-2127

RICHARD HUSS and JEFFREY SMILOW, :

Defendants-Appellants. :

----------x

APPENDIX

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(1)

DOCKET ENTRIES

A. United States of America v. Jeffrey Smilow
73 Crim. Misc. 24

CRIMINAL DOCKET 73 CRIM MISC. 24 — CRIMINAL CONTEMPT (Re: 72 CR 778)

DATE	JUDGE GRIESA — PROCEEDINGS 18:401; Rule 42(b) F.R.Cr. Proc.
	For Gov't.: Henry Putzel, III, ASA
	Ex 6321
	UNITED STATES OF AMERICA
	vs.
	RICHARD KISS

~~6-29-73~~ (6-29-73)	Filed affdvt. and order to show cause in re Criminal contempt. - ret. 7-3-73 at 10:30 A.M. in Room 110
~~7-3-73~~ (7-3-73)	Filed notice of appearance by Arthur Miller, Esq., 1908 Avenue R, Brooklyn, NY (Phone: 646-1105)
~~7-3-73~~ (7-3-73)	Deft. pleads not guilty. (Bail limits extended to include all of N.Y. State) 10 days for motions - Case assigned to Judge Griesa (also see 73 CR Misc. 24)
~~8-8-73~~ (8-8-73)	Filed consent to change Atty, Paul Chevigny Esq, 84 5th Ave as new atty.
~~9-26-73~~ (9-26-73)	Filed affirmation and order consented, that the defts bail limits are extended to include the D.C.N.Y. and the Dist. of New Jersey. Griesa,J.
11-2-73	Filed affidavit and notice of motion for disclosure and to dismiss.
	Filed memorandum of law in support of motion.
	Filed notice of motion for disclosure.
	Filed memorandum in support of motion. (See 73 Cr. Misc. 24)

Docket Entries, U.S.A. v. Jeffrey Smilow, con't.

5-6-74	Filed Govt's memo. in opposition to defts' pre-trial motions. Filed memo. of law for deffts.'. Filed Opinion by Griesa,J.-Opinion #40672-Defendants motions denied. (See opinion in room 504)
7-17-74	Defendant guilty as charged. Sentence date Sept. 11, 1P.M., Wednesday, Room 1505. Presentence report ordered.
7-16-74	RICHARD HUSS - Re-application for bail granted. Deft. released on $60,000 bail, $50,00 secured by parents' home and $10,000 PRB signed by father. Sentence date July 31, 1 P.M. Pre-sentence report ordered. Deft. released immediately and bail to be met by 1 P.M. July 19,1974.
7-19-74	RICHARD HUSS - Filed PRB in the sum of $10,000 aknowledged by cashier.
7-31-74	Filed Judgment and Order:*********It is hereby ORDERED AND ADJUDGED that Richard Huss and Jeffrey Smilow be, and hereby are, remanded to the custody of the Attorney General or his duly authorized representative for a period of One(1) Year, service of the said sentence to commence August 5, 1974 at 10:00 a.m. at which time the said defendants shall surrender themselves at Room 506, United States Courthouse, Foley Square, New York, N.Y. It is so ordered. Griesa,J. (Certified copies to U.S. Marshal)
8-1-74	Filed Order. It is hereby adjudged and decreed that during the sentences of the defts. purs. to their convictions in the above-entitled action, the defts. shall be allowed food in accordance with Jewish dietary laws. Griesa,J.(m/n)
8-1-74	Filed Memorandum Decision#41051******** Deft. has moved for release on bail pending appeal. The application is denied. So Ordered.
8-2-74	Filed notice of appeal to U.S.C.A. for the 2nd. Circuit from Judgment of J.S.D.C. for the S.D.N.Y. of criminal contempt entered 7-31-74. (Notices mailed to Govt.,deft's atty. & defts.)

(3)

B. United States of America v. Richard Huss
73 Crim. Misc. 25

CRIMINAL DOCKET 72 CRIM MISC 21 CRIMINAL CONTEMPT (Re 72 CR 778)

DATE	JUDGE GRIESA PROCEEDINGS 18:401; Rule 42(b) F.R.Cr. Proc.
	For Govt.: Henry Putzel, III, AUSA Tr. 6331
	UNITED STATES OF AMERICA
	vs.
1	JEFFREY M. SIMLOW

~~6-29-73~~ (6-29-73)	Filed affdvt. and Order to show cause in re Criminal contempt. - ret. on 7-3-73 at 10:30 A.M. in Room 110
~~7-3-73~~ (7-3-73)	Filed notice of appearance by Robert P. Leighton, Esq., 15 Park Row, NYC (267-~~7616~~)
~~7-3-73~~ (7-3-73)	Deft. pleads not guilty (bail continued) 10 days for motions - case assigned to Judge Griesa. (also see 73 CR Misc. 25) -- Knapp, J.
~~7-3-73~~ (7-23-73)	MATHEW LEVI MARTIN. Filed Commitment & entered return, Deft. Delivered to the Detention Hdqtrs NYC
~~8-8-73~~ (8-8-73)	Filed consent to change Atty, Paul Chevigny 84 5th Ave.
11-2-73	Filed affidavit and notice of motion for disclosure and to dismiss.
	Filed memorandum of law in support of motion.
	Filed notice of motion for disclosure.
	Filed memorandum in support of motion. (See 73 Crim Misc. 25)

Docket Entries, U.S.A. v. Richard Huss, con't.

5-6-74	Filed Govt's memo. in opposition to defts's pre-trial motions.
	Filed reply memo. of law for defts's.
	Filed Opinion by Griesa, J.-Opinion #40672-Defendants motions denied. (See opinion in room 504)
7-17-74	Defendant guilty as charged. Sentence date Sept. 11, 1 P.M. Wednesday, Room 1505. Pre-sentence report ordered.
7-19-74	Re-application for bail granted. Deft. released on $60,000 bail, $50,000 secured by parent's home and $10,000 PRB signed by father. Sentence date July 31, 1 P.M. Pre-sentence report ordered. Deft. released immediately and bail to be set by 1 P.M. July 19, 1974.
7-22-74	JEFFREY H. SMILOW - Filed PRB in the sum of $10,000.00 aknowledged by cashier.
7-31-74	Filed Judgment and Order:********** It is hereby ORDERED AND ADJUDGED that Richard Fuss and Jeffrey Smilow be, and hereby are, remanded to the custody of the Attorney General or his duly authorized representative for a period of One(1) Year, service of the said sentence to commence Aug. 5, 1974 at 10:00 a.m. at which time the said defendants shall surrender themselves at Room 506, United States Courthouse, Foley Square, New York, N.Y. It is so ordered. Griesa,J. (Certified copies to U.S. Marshal)
8-1-74	Filed Order: It is hereby adjudged and drcreed that during the sentences of the defts. purs. to their convictions in the above-entitled action, the Defts. shall be allowed food in accordance with Jewish dietary laws. Griesa, J. (m/n)
8-1-74	Filed Memorandum Decision#41050 **********Deft. has moved for release on bail pending appeal. The application is denied. So ordered. Griesa,J.(m/n)
8-[illegible]-74	Filed notice of appeal to U.S.C.A., for the 2nd Circuit from judgment of U.S.D.C., for the S.D.N.Y. of criminal contempt entered 7-31-74. (Noticesmailed to Govt.,deft's attys. & defts.)

(5)

ORDER TO SHOW CAUSE AND EXHIBITS

73 CR [illegible] 24

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA :

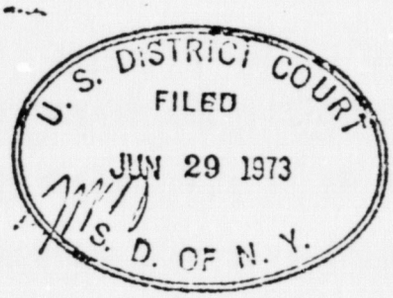
Re: 72 CR. 778 A.B.

-v- ORDER TO SHOW CAUSE

JEFFREY H. SMILOW, :

Defendant. :

- X



Sufficient cause appearing therefor, it is hereby ORDERED pursuant to Rule 42(b), Federal Rules of Criminal Procedure that Jeffrey H. Smilow show cause before this Court on July 3, 1973 at 10:30 a.m. in Room 110 of the United States Courthouse, Foley Square, New York, New York, why he should not be adjudged in criminal contempt of Court for his wilful refusal to answer questions put to him at the trial of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778, as more fully set forth in the accompanying affidavit.

IT IS FURTHER ORDERED that service of this order to show cause on Jeffrey H. Smilow on or before 5:00 p.m., June 28, 1973, be deemed good and sufficient service.

IT IS FURTHER ORDERED that, for the reasons stated by me in open Court, Jeffrey H. Smilow be arrested by the

United States Marshal, and

IT IS FURTHER ORDERED that, for the reasons stated by me in open Court, bail shall be fixed in the amount of $50,000 cash or surety bond, and the defendant shall be remanded to the custody of the Attorney General or his duly authorized representative if he is unable to post such bail.

IT IS FURTHER ORDERED that the United States Attorney for the Southern District of New York or any Assistant United States Attorney be and they hereby are appointed and directed to prosecute said Jeffrey H. Smilow on behalf of this Court.

Dated: New York, New York

June 28, 1973

SO ORDERED:

ARNOLD BAUMAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

-v- : AFFIDAVIT

JEFFREY H. SMILOW, :

Defendant. :

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

HENRY PUTZEL, III, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and, as such, was in charge of the prosecution of the case of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778. I make this affidavit in support of the Government's application for the issuance of an order directing Jeffrey H. Smilow to show cause why he should not be held in criminal contempt for wilfully refusing to obey the Court's lawful order to answer questions put to him during the criminal trial of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778,

2. On May 30, 1973, a jury was duly empaneled in this District to hear the criminal case of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778. On June 8,

1973 JEFFREY H. SMILOW was called to testify as a witness in said case and was duly placed under affirmation.

3. On June 8, 1973, after Smilow had asserted his privilege against self-incrimination the Court conferred immunity upon him pursuant to Title 18, United States Code, Sections 6002 et seq. Thereafter, the said JEFFREY H. SMILOW did wilfully and without just cause refuse to obey the Court's lawful order to answer the questions put to him by counsel for the Government. The Court thereupon adjudged Smilow in civil contempt of Court pursuant to Title 28, United States Code, Section 1826 and ordered that he be imprisoned until he should purge himself of his contempt by answering the questions as ordered by the Court or until the conclusion of said trial. The Court also explicitly advised Smilow at that time that, should he persist in his wilful refusal to obey the Court's lawful order, he would be subject to punishment for criminal contempt.

4. On June 26, 1973 the United States Court of Appeals for the Second Circuit affirmed the judgment of civil contempt. On June 27, 1973, JEFFREY H. SMILOW was again placed under affirmation in the trial of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778 and thereupon repeated his refusal to answer the questions previously

put to him. The Government thereupon stated that it was unable to proceed with the prosecution of the charges at bar, and the trial was thereupon terminated.

5. I attach herewith and incorporate as a part of this affidavit the transcripts of proceedings of June 8, 1973 (Exhibit A) and of June 27, 1973 (Exhibit B).

6. No prior application has been made for this relief.

WHEREFORE, it is respectfully requested that the order to show cause be issued.

HENRY PUTZEL, III
Assistant United States Attorney

Sworn to before me this
28th day of June, 1973

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975

EXHIBIT "A" TO ORDER TO SHOW CAUSE

JEFFREY SMILOW, called as a witness by the Government, being affirmed, testified as follows:

MR. ROBERT LEIGHTON: Your Honor, at this time I respectfully ask the Court to direct the United States Attorney not to call Mr. Smilow as a witness and ask the Government whether or not under Section 3504A-1, they have any illegal wiretaps or any wiretaps or any electronic surveillance wherein the voice of Mr. Smilow has been recorded and/or overheard.

MR. JAFFE: Your Honor, the Government has read into the record the telegram with regard to the electronic surveillance. We have also furnished to counsel copies of logs which contain the name Jeff. The Government does not have knowledge of whether that is Jeffrey Smilow or some other Jeff but those logs have been furnished to Mr. Smilow's counsel.

THE COURT: Yes.

MR. JAFFE: With regard to a statement that other than those logs furnished, there are no electronic surveillances of this individual.

We have an affidavit which is going to be filed with the Court as soon as we get it from the Department of

Justice and we are told that the affidavit will state that other than the overhearings of the name Jeff, there are no electronic surveillances of this witness Jeffrey Smilow and that includes the affidavit Court Exhibit 3 with regard to the CIA.

THE COURT: Yes.

MR. LEIGHTON: Your Honor, may I state that the Government did hand to me today a copy of logs which I presume is the sum and substance of the wiretaps concerning a Jeff and the possibility of a Mr. Smilow.

THE COURT: I so understand.

MR. LEIGHTON: We have not had the opportunity to listen to these tapes or to see a transcript if such transcript was ever compiled. I understand no such transcript was every compiled.

MR. JAFFE: Our information, your Honor, is that, and this is from testimony that your Honor heard, there are no tapes, there are no transcripts, there are only these logs.

MR. LEIGHTON: Your Honor, we still have not had an opportunity to listen to these tapes. The logs are a mere summary.

THE COURT: He just said they don't exist any more.

MR. LEIGHTON: The tapes do not exist.

MR. JAFFE: That's correct.

MR. LEIGHTON: Your HOnor, on this basis alone I would ask your Honor to direct the Government to refrain from calling Mr. Smilow as a witness.

THE COURT: I have not seen these logs. Let me see them, please.

MR. JAFFE: I will hand up to the Court--mark this Court Exhibit 4, if the Court please?

(Court Exhibit 4 marked in evidence.)

THE COURT: Just on that one page that you have marked Exhibit 4?

MR. JAFFE: The second page. It is a carrying page, your Honor.

THE COURT: Just these two pages?

MR. JAFFE: That's correct, your Honor.

MR. LEIGHTON: Your Honor, may I further call to the Court's attention, I am sure that the court is aware of Section 2518 of Title 18, subdivision 8A, where it clearly states that recordings, tapes, shall not be destroyed and they should be kept available for a period of ten years.

I think this argument was raised at an earlier point with one of the other witnesses.

MR. JAFFE: Your Honor, that is the warehousing

issue that was raised before the Court and that particular section is directed to Court Ordered wiretaps.

It is not appropriate for national security wiretaps. The Government has raised t[illegible] issue with the Court and that issue is raised by Seigel on appeal.

THE COURT: Denied.

MR. LEIGHTON: Your Honor, I would also ask your Honor for a similar order on the basis that the Government has further electronic surveillance of this defendant with Sheldon Seigel.

THE COURT: I don't understand you Mr. Leighton.

MR. LEIGHTON: The Government has stated that there is no other electronic surveillance of this witness.

THE COURT: Right.

MR. LEIGHTON: It's come to my attention that the Government is in possession of further and other surveillance of this witness, Mr. Smilow; that is, namely taped conversations.

THE COURT: Electronic?

MR. LEIGHTON: Taped conversations.

THE COURT: All right,

MR. LEIGHTON: With Mr. Seigel?

MR. JAFFE: We have consentual conversations between Mr. Smilow and Mr. Seigel. Those we do have, your Honor,

and those were taken by Mr. Seigel wearing a wire recorder on his body; he having consented to engage in conversations with Mr. Smilow at that time. I am informed that transcripts of those conversations have been turned over to Mr. Leighton.

MR. LEIGHTON: Your Honor; I haven't had an opportunity to read those conversations. The basis for my argument is that based on merely the decision, we have a decision where there is an alleged Government informer who is partaking in defense strategy, sort of an enemy in the defense camp and the Government, using this informant, obtained information which I feel is going to be the basis of certain questions placed to Mr. Smilow in this proceeding.

Therefore, it is tainted and illegal.

THE COURT: I think I have ruled on that substantially already, have I not?

MR. JAFFE: Your Honor, those taped conversations are conversations that were taped before a complaint was filed in this case.

MR. LEIGHTON: Judge, I was never a part of any proceeding which took place previously or prior to last week. Mr. Smilow was never called to any of the other proceedings.

THE COURT: But his point is the well-known one that where one party to a conversation consents and records,

that is not an illegal act; and there doesn't seem to be much question about that principle at all.

MR. LEIGHTON: My argument your Honor, is that Mr. Seigel was a Government informant, a Government agent at that time.

THE COURT: Sure. I don't think you will get any disagreement about that.

MR. JAFFE: Absolutely not, Judge.

THE COURT: They are the people who wired him presumably, although has shown himself to be pretty good at the thing himself.

MR. LEIGHTON: It is a similar situation as in the Rosner matter which was tried before your Honor, and that question was raised.

Mr. Smilow is a defendant presently in the State Court under charges which are mentioned in this indictment. Mr. Smilow conferred with defendants in this case and Mr. Seigel as a Government agent and informant conferred while he was a Government agent, obtaining information which he should not have obtained.

MR. JAFFE: Your Honor, I think he totally misses the point. The point is that Seigel was a Government informant who, prior to the filing of any indictments either in the State Court or in this Court concerning these bombings, engaged in conversations as a Government informant and made

certain wire recordings of the voices; and there is absolutely no law that says the Government is not entitled to use a consenting informant to do that.

THE COURT: Yes, your application is denied. That is the law beyond [illegible]cion, Mr. Leighton.

MR. LEIGHTON: There is one further application, your Honor, to direct a similar order and that is that this defendant has already once been held in jeopardy on the same issue although it was before a grand jury and not a court proceeding.

He has already been held in contempt, he has already been punished, and that case was eventually dismissed although this defendant did spend some two weeks incarcerated.

THE COURT: That has nothing to do with this particular law suit.

Denied.

DIRECT EXAMINATION

BY MR. JAFFE:

Q Mr. Smilow, would you tell us your age, sir?

A 18.

Q I don't hear you.

A 18.

THE COURT: He said 18.

MR. JAFFE: May I have a moment to get a file, Judge?

THE COURT: Yes.

MR. SLOTNICK: While Mr. Jaffe is getting the file, in order to expedite matters, I would renew my objection based upon the fact I think the same procedure will accompany Mr. Smilow's testimony if any and for the purpose of the recording by reference everything I have said before with regard to the other witnesses.

THE COURT: Yes. The same ruling.

BY MR. JAFFE:

Q Mr. Smilow, directing your attention to January 26, 1972, did you on that day during the morning, see Sheldon Davis or Stuart Cohen?

A I refuse to answer on the ground that to require me to respond to the question would violate my Constitutional right of freedom of worship as a committed and observant Jew under the First Amendment to the United States Constitution and that to compel me to answer said question would violate my right of freedom of worship as a committed and observant Jew in that under traditional Jewish Law I didn't testify in any case where I am to receive an advantage or benefit because of my testimony against individuals.

I refuse to answer the question on the ground that I presently am charged with committing on January 26, 1972 at about 9:25 a.m., at 185 West 57th Street, New York, a crime of arson.

I refuse to answer on the ground that to require me to respond to the question would violate my right to remain silent guaranteed under the First Amendment of the United States Constitution.

I respectfully refuse to testify against myself. I further refuse to testify on the basis that the Government obtained information illegally by allowing a co-defendant to act as an informant and to participate in taped conversations with me.

I further respectfully refuse to answer on the basis that I have already been put in jeopardy for the same proceeding and I have been already punished although that proceeding was dismissed.

MR. JAFFE: With regard to the witness' refusal to answer on the basis that he refuses to testify against himself, the Government at this time makes application to grant immunity to the witness. We hand up to the Court the original application and copies of the original letters and we hand a copy of the immunity application to his attorney.

MR. SLOTNICK: May defense counsel have a copy of

that, your Honor.

MR. JAFFE: I will hand a copy to defense counsel, so they both may take a look at that, your Honor.

MR. SLOTNICK: Thank you, Mr. Jaffe.

THE COURT: There is a blank in the date of filing in the order.

MR. JAFFE: That was originally filed on the 31st, your Honor.

THE COURT: On may 31st?

MR. JAFFE: That's correct.

THE COURT: Mr. Smilow, I have just signed an order that confers upon you immunity against the use of anything that you are required to testify to in this courtroom. Do you understand that?

THE WITNESS: I understand.

THE COURT: DO you want a reasonable time to talk to your lawyer about the significance of the order I have just signed?

A No.

THE COURT: The witness says no. Go ahead.

MR. SLOTNICK: Your Honor, for the record, my silence should not be an indication of approval other than just I am constrained to act under your Honor's prior ruling.

THE COURT: I understand, yes. You have a continuing objection to these entire proceedings, both of you?

MR. JAFFE: Your Honor, with regard to the other basis raised by the witness with regard to his religious objection, the religious objection is almost in haec verba the statement he made before the grand jury, which was subsequently made before Judge Weinfeld and determined to be insufficient, affirmed by the Second Circuit in the First Smilow case by Judge Feinberg; and we would ask the Court to instruct the witness with regard to his religious bases that in fact he has no religious basis on which he may decline to answer questions under the First Amendment.

THE COURT: Yes. You understand that so far as your assertion of a privilege, whether it be constitutionally based or religiously based, I do not find that that is an appropriate reason for refusing to answer proper questions, and I should direct you to answer such questions as I deem proper.

MR. JAFFE: With regard to the refusal to answer based upon his indictment or his plea to arson in the New York State Court, we would ask that this exhibit be marked Exhibit 5, Court Exhibit 5 for the Court to take

judicial notice of the fact that the witness has on November 27, 1972 entered a plea of guilty to an E Felonyfor the arson he was charged with, and that his refusal to testify based on any type of Fifth Amendment ground is covered by the immunity that the Court has just conferred upon him.

(Court Exhibit 5 marked.)

THE COURT: I think the record should indicate that I addressed to the witness a statement that immunity has been pursuant to the authority set forth in Title 18 U. S. Code, Section 6003.

MR. JAFFE: With regard to his other basis for refusing to testify--

THE COURT: Just a moment. 6002 is the order thatI made. In any event you understand that now immunity has been conferred upon you, do you not?

A Yes.

MR. JAFFE: With regard to his other basis, your Honor, the witness refuses to answer based on two assertions, one that he has been placed in double jeopardy in that he was on a previous occasion held in contempt for refusing to testify. We ask the Court to instrut him that that is an insufficient basis for refusing to now testify before a hearing held in front of the Court.

THE COURT: I so instruct the witness.

MR. JAFFE: With regard to his refusal to answer based on the discovery of this witness by the existence of tapes which led to the discovery of the witness Sheldon Seigel, we would ask the Court to instruct him that that too is no basis on which he may refuse to testify.

THE COURT: Yes, the witness is so instructed.

BY MR. JAFFE:

Q Mr. Smilow, directing your attention to January 26, 1972, did you on that date meet with Sheldon Davis, and with Murray Elbogen, Jerome Cellerkraut, and Richard Huss?

THE COURT: You need not read the entire thing, Mr. Smilow. You may say "same declination" if that is what you want to do.

A Same declination?

MR. PUTZEL: I didn't hear the answer.

THE COURT: He said "same declination".

MR. JAFFE: Would the Court direct the witness to answer that question.

THE COURT: I order you to answer that question.

THE WITNESS: Same declination.

Q Mr. Smilow, who did you prior to January 26, 1972 have any conversations with Stuart Cohen or Sheldon Davis concerning your agreement with them to take an attache

case to the premises of Columbia Artists Management, Inc. to there ignite a fuse contained in that attache case and in fact on the 26th?

THE COURT: Mr. Jaffe, don't tell a story. Just read a lawyer-like question, please.

MR. JAFFE: Let me withdraw the question.

Q Prior to January 26, 1972, did you have a conversation or conversations with Sheldon Davis and with Stuart Cohen concerning your involvement in going to Columbia Artists Management?

A Same Declination.

THE COURT: I order you to answer, sir.

THE WITNESS: Same declination.

Q As a result of that conversation, or any conversations, did you on the 26th of January 1972 go with certain individuals in a car from Brooklyn to Manhattan?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same.

Q Did you on the 26th of January 1972 go with an individual to the premises of Columbia Artists Management?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

THE COURT: I think that is enough, Mr. Jaffe. Why don't you ask him one question to the effect as to whether or not he intends to decline on those grounds?

MR. JAFFE: Judge, may I have an identification of something first?

THE COURT: An identification of something? Yes, of course. What is it?

MR. JAFFE: I would like to just show the witness Court Exhibit 5 and ask if those were the statements that he made.

MR. ZWEIBON: Objection, your Honor.

MR. SLOTNICK: I would like to look at them before the witness is shown.

THE COURT: Let them look at it.

Q Mr. Smilow I show you Court Exhibit 5 for identification. Take a look at Court Exhibit 5.

Mr. Smilow, have you read Court Exhibit 5?

A Yes.

Q Having read Court Exhibit 5, is that an accurate transcript of the statements that you made before the Honorable Harry B. Frank on November 27, 1972?

MR. SLOTNICK: I object, your Honor. It is not

binding on my client. It is beyond January 26, 1972; the specific date in the indictment, and it is not in furtherance of anything that I know of having to do with this Court, plus the fact that--

THE COURT: If the jury were in the box, there is no question it would be a total improper question, Mr. Jaffe.

MR. JAFFE: I understand.

THE COURT: Why should I take it now.

MR. JAFFE: Your HOnor, what we are trying to do is have the witness identify statements he has made before and ask him whether the statements are truthful and then ask him whether the statements are truthful and then ask him the same question--

THE COURT: Sustained.

BY MR. JAFFE:

Q Directing your attention to the month of June 1972 Mr. Smilow, did you have any conversations with Sheldon Seigel?

A Same declination.

MR. SLOTNICK: Objection, your Honor.

MR. ZWEIBON: Objection.

MR. SLOTNICK: Again, I think the record will indi-

cate this is part of an objection I made as to other witnesses and is a continuing objection as to this witness.

THE COURT: What did you say?

THE WITNESS: Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same.

Q Mr. Smilow is ityour intention that to any other questions that I put to you that you will give the same declination and refuse to answer?

MR. SLOMNICK: I object to that your Honor as not being part of the proceedings.

THE COURT: Overruled.

Q Sir?

THE COURT: Answer it?

THE COURT: You decline to answer whether you will continue to answer?

THE WITNESS: I will answer the same way.

THE COURT: You will answer the same way. All right.

MR. JAFFE: At this time, your Honor, the Government would ask the Court under Title 28, Section 1826A to

find that this witness is in contempt of Court and the Government's application is that the Court order he be remanded to the custody of the attorney general for the duration of this proceeding until such time as he gives testimony before this Court.

THE COURT: Mr. Smilow, I want to explain something to you.

I am about to hold you in civil contempt. That means that I am going to order that you be placed in the custody of the Attorney General for the duration of the trial unless in the interim, in the meanwhile you indicate your willingness to answer the questions you have declined to answer today.

Do you undestand?

THE WITNESS: I understand.

THE COURT: That is civil contempt, and the purpose of civil contempt is to induce you to break your silence.

There is another kind of contempt which is called criminal contempt, which has as its purpose punishment for the crime of contempt. The two are not exclusive. Do you understand what I have just told you?

THE WITNESS: Yes.

THE COURT: All right, Mr. Smilow. The Court finds you in civil contempt and it is the order of the Court that you be committed to the custody of the Attorney General for the duration of the trial or until such time as you answer the questions which you have declined to answer today.

Yes, Mr. Leighton?

MR. LEIGHTON: Your Honor, would you hear me on the question of bail?

THE COURT: Yes.

MR. LEIGHTON: This defendant is 18 years of age, he is currently completing his first year at City College, and he too, like the previous witness, is going through his final examination period at this time.

I believe he has three or two exams to complete before completing his first year at City College.

THE COURT: I will see to it that he gets a chance to complete his examinations.

MR. LEIGHTON: I think this defendant has other grounds of non-frivolous nature as opposed to the previous witness.

This witness has raised the question of double jeopardy which your Honor has already ruled upon. We have

also the question of the destroyed wiretaps which your Honor has already ruled upon; and this witness has an additional argument of a violation of due process in that Mr. Seigel, although a Government Agent and although he, Mr. Seigel, consented, did take down the conversations of this witness who has a case pending in the State Courts covering facts which are in this indictment.

I think this is a non-frivolous ground, I think it is a good ground for appellate review, and I would ask your Honor to consider setting bail in Mr. Smilow's case.

May I further add that Mr. Smilow is presently out on a $3500 bail on the case pending in the State court. I would ask your Honor to set a bail in this case or release the defendant on his own recognizance.

THE COURT: I am not going to do that and the reason I am not going to do that is that unlike the usual appeal section in which the bail laws indicate that bail is to be granted unless certain conditions exist, the civil contempt statute runs in quite the opposite way, quite the opposite way, and is cast in language which as I remember it,

says something like "the defendant shall not be admitted to bail unless," and I draw from that the conclusion that that law is to be construed as I have just suggested.

I reluctantly must tell you that I do not, cannot say that I regard any of the grounds the witness has invoked here as substantial, and I shall not admit him to bail.

MR. LEIGHTON: Your Honor will direct the marshal to make an effort to see that this witness does take his examinations?

THE COURT: I order the marshal to see to it that this witness, as well as the previous one who has been committed, will have an opportunity to take his examinations. I want that communicated to the marshal as I did in the other situation. These young men will have a chance to take their examinations, and that is an order.

MR. LEIGHTON: Your Honor, one further--

THE COURT: With respect to the kosher food thing, that has already been raised and I am going to have to ask the United States Attorney to convey my view that if it is in any way psosible, that these people who are committed should have their dietary requirements respected.

MR. SLOTNICK: Your Honor, there is a case in some circuit court called Barrett against something. I remember

reading it when I had the problem before Judge Weinstein in the Eastern District.

Judge Weinstein signed an order ordering the warden of the West Street Penetentiary to provide kosher food for the--in that case it was a defendant--and I believe he based his order upon the Barrett case.

MR. PUTZEL: We will do all we can, your Honor. I don't know of the case but I really represent to the Court that we will exercise our best efforts.

THE COURT: Better than that you suggest to the United States marshal that if he finds it difficult, I may just very well sign an order.

MR. PUTZEL: It won't be the marshal.

THE COURT: I mean the warden of that facility, that I may very well sign an order of the Court such as Judge Weinstein has previously signed.

In other words, I want something more than lip service when I say that I want these young men to be able to observe their religion and its tenents.

MR. PUTZEL: I understand, your Honor, and we will follow the spirit as well as the letter.

THE COURT: I think what I want you to convey is that I mean business.

MR. PUTZEL: I shall convey that, your Honor.

THE COURT: All right.

MR. LEIGHTON: Thank you very much.

THE COURT: Gentlemen, I think we will recess now until 2 o'clock.

MR. PUTZEL: Your HOnor, I was just thinking, we are going to recall Mr. Seigel. I have talked to Mr. Dershowitz with reference to what Mr. Seigel is going to say, and I do not think it is necessary to keep the jury here. Perhaps we should excuse the jury now.

THE COURT: We have had Mr. Huss, Mr. Smilow, Mr. Seigel, and the fourth fellow is--

MR. PUTZEL: Mr. Elbogen is not here and we will not be--

THE COURT: All right then we shall sit. You may step down, sir.

(Witness excused.)

THE COURT: We shall sit until we dispose of the Seigel thing and then we will let everybody go for the day.

MR. PUTZEL: All right, fine.

The Government calls Sheldon Seigel.

EXHIBIT "B" TO ORDER TO SHOW CAUSE

J E F F R E Y S M I L O W, called as a witness in behalf of the government, was duly affirmed, and testified as follows:

THE COURT: I will hear you, Mr. Leighton.

MR. LEIGHTON: If it please the Court, I am Robert Leighton, 15 Park Row, New York. Before this witness is asked any question, your Honor, I would ask the Court to restrain the government from calling Jeffrey Smilow as a witness on the basis that his identity is tainted because of the illegalities surrounding the subject, the wiretap Goigal which was decided by the Circuit Court of

Exhibit B

Appeals of this circuit.

I believe yesterday in the decision it said that the knowledge of Mr. Seigel's whereabouts was tainted because it was based on illegal wiretaps and illegal search of a vehicle that he possessed. It is our claim that under the Wong Son rule --

THE COURT: Weren't you aware of that rule before the appeal; hadn't you heard of it?

MR. LEIGHTON: I had, your Honor.

THE COURT: You made no application before for a hearing.

MR. LEICHTON: I thought that in asking for the wiretaps, or a transcript of these wiretaps was tantamount to my asking for a hearing and I thought the Court in the interests of justice would direct a hearing be held in order to see whether or not taint was involved.

THE COURT: I am just going to let that pass without responding to it.

MR. PUTZEL: I would like to ask Mr. Leighton what his claim is, because it seems to me what he is stating here, your Honor, is that he is moving to suppress his client's testimony because Seigel, whom the Court of Appeals has found would give tainted testimony, was the person who revealed his whereabouts.

Is that the gist of what you are saying?

MR. LEIGHTON: That is right, Smilow's disclosure.

MR. PUTZEL: So you are conceding that Seigel was the source of our knowledge of Smilow; is that right?

MR. LEICHTON: I am not conceding it, but that is a statement in the government's brief, that Mr. Seigel is the person from whom they learned of Mr. Smilow's whereabouts.

MR. PUTZEL: We so state that.

THE COURT: Now that that has been stated, what more do you want to prove?

MR. LEIGHTON: My statement is that the questions propounded to Mr. Smilow and Mr. Smilow's knowledge of participation or alleged participation were learned through Mr. Seigel and since Mr. Seigel was discovered through illegal means, Mr. Smilow discovered through Mr. Seigel, Mr. Smilow's -- therefore his testimony would be tainted under the Wong Son rule.

THE COURT: Yes.

MR. PUTZEL: As to that, your Honor, I believe that issue was squarely raised in the Court of Appeals and rejected. It was certainly argued in our brief. The taint as to Seigel has been found by the Court of Appeals

and I am not going to discuss that here, but certainly there is a gross attenuation as to the fact that Smilow was discovered through Seigel. Smilow certainly has no standing to assert the taint claims that Seigel had and I believe that the Court of Appeals ruled squarely on that subject.

THE COURT: I have the opinion here. Point it out to me.

The government's concession eliminates the necessity for a factual hearing; is that right? He admits or indeed insists that Smilow's identity was learned from Seigel.

MR. LEIGHTON: That is the government's contention. I don't concede that that is the truth.

I have a second application also, your Honor.

THE COURT: What is it?

MR. LEIGHTON: The second application is that the government has conceded that there have been illegal wiretaps on the JDL office wherein the name Jeff has been heard plus many other wiretaps wherein no concession has been heard that the voice of Jeffrey Smilow was on these tapes.

At this time, your Honor, I would ask your Honor for a hearing to see whether or not there was any

mcbr 23 Smilow-

illegal evidence obtained concerning the defendant Smilow. I would ask your Honor for a hearing at this time to see whether or not there is any taint you'd have to decide.

THE COURT: Yes.

MR. PUTZEL: Our view as to that, your Honor, is that I believe Mr. Leighton is making absolutely inconsistent claims here and he has to choose which one he really wants to assert here.

THE COURT: Let me ask you this before we get into any further questioning of this man. Why isn't the record of his last questioning in which I informed him that he could be prosecuted for criminal contempt if he persisted, why is that record not sufficient for you to proceed in criminal contempt and let him raise those questions before any Judge who is involved in the trial of the criminal contempt.

MR. PUTZEL: In our view it is because the Court of Appeals squarely held in this matter that Smilow was aware of all of these circumstances and because he knew darn well that Seigel was the source of his identity, chose not to raise that motion and therefore waived that. It is on page 31 of the opinion.

THE COURT: Let me see it, please.

MR. SMILOW: The last paragraph.

(Pause.)

THE COURT: I have read that.

Let me ask you, Mr. Smilow, are you prepared to answer the questions which you refused to answer at the last session?

THE WITNESS: No.

MR. PUTZEL: May we mark as an exhibit the transcript of June 8, 1970 starting at page 178?

MR. ZWEIBON: Is this a transcript in this proceeding?

THE COURT: Yes. I don't think we need to mark it. You can direct my attention to it and counsel's attention to it.

MR. PUTZEL: Directing the Court and counsel and the witness' attention to the transcript beginning at page 178, we would ask Mr. Smilow to take a look at the transcript, to look at the questions that were asked him, and tell us whether it is his continued intention to refuse to answer those questions.

MR. LEIGHTON: Prior to Mr. Smilow being requested to do that I would ask your Honor at this time to direct that a hearing be held to decide whether or not the wiretap in question on the JDL office did in fact have information which led to the whereabouts of Mr. Smilow

and whether or not it is tainted.

THE COURT: I decline to do so. I am not even going to ask him anything today other than the fact that he would persist in his refusals to answer. Beyond that I think the record is sufficient to proceed against him, as I warned him the last time, for criminal contempt, and the United States Attorney advises me that he is going to do it based on the record the last time at which you made no such request.

Then if you want to take it up with the trial judge, whoever it may be, in his criminal contempt case, that may be the place to do it. But for now I believe, and I advise you, sir, that your failure to answer questions which you are now looking at at the last session which you were called upon to testify constitutes criminal contempt of court and that the punishment for criminal contemtp is without limit.

Is that clear?

THE WITNESS: Yes.

MR. LEIGHTON: Is your Honor going to allow the United States Government to ask of Mr. Smilow questions concerning this record?

THE COURT: No, the record is clear.

MR. PUTZEL: I think the record is perfectly

clear and I think Mr. Smilow has answered that he persists in his contemptuous refusal to answer questions and, accordingly, pursuant to Rule 42B of the federal rules of criminal procedure we will move this court through an order to show cause on papers to have Mr. Smilow cited for criminal contempt.

I would ask the Court to inquire of Mr. Smilow whether he was in court just previous to this during the time when Mr. Huss was advised by the Court of the consequences of refusal to testify.

THE COURT: Were you here when I dealt with Mr. Huss a few moments ago; were you in the courtroom?

THE WITNESS: Yes.

THE COURT: You heard the entire --

THE WITNESS: Yes.

THE COURT: -- situation, all the questions and everything I said to Mr. Huss?

THE WITNESS: Yes.

THE COURT: All right.

MR. PUTZEL: Our application is that Mr. Smilow be arrested and that bail be fixed in the amount of $50,000.

THE COURT: I will hear you.

MR. LEIGHTON: Your Honor, on the question of

bail, you are fully familiar with the background of this witness. He has been before your Honor several times. To touch the highlights, I believe he is 18 years old and he is a freshman at City College. He has been before this court several times. He has been before Judge Weinfeld, I believe, in another proceeding several times. He appeared in court on each and every occasion.

He lives at home with his parents. They reside in Kings County. His mother is here in court and has been here each and every occasion.

This witness is presently out --

THE COURT: Do you know who isn't in court today? Iris Cones.

Go ahead.

MR. LEICHTON: This witness is presently indicted in the state court on charges arising out of charges in this indictment. He is presently out on bail at $3,500 in the State Court. That case is still pending.

I believe that the defendants in this case have been released on $25,000 bail. I know the government has requested $50,000. Your Honor has set $50,000 bail on the prior witness. I would respectfully urge upon your Honor to set a more reasonable bail because $50,000 bail would be tantamount to no bail at all for this

defendant -- for this witness. He will be --

THE COURT: He is about to be a defendant.

MR. LEIGHTON: He will not be able to raise that bail. I ask your Honor to consider if the Court is going to impose a $50,000 bail that the Court consider a higher personal recognizance bond and allow a $3,000 or $2,000 cash security to be placed with the signature of his mother and father as guarantors of this defendant's presence in court.

THE COURT: I am going to fix $50,000 cash or surety bond. If the Court of Appeals decides the bail is excessive -- they are on the 17th floor and that is what they are there for. Bail is fixed in the sum of $50,000.

MR. LEIGHTON: Thank you, your Honor.

THE COURT: You may step down, Mr. Smilow.

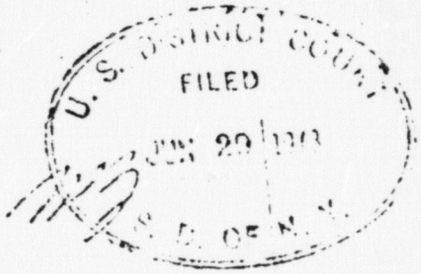
(Witness excused.)

MR. PUTZEL: It is intended to serve counsel for Mr. Hums and Mr. Smilow with formal papers this afternoon citing them for criminal contempt for their wilful refusal to answer questions. We would ask this Court to fix a date by which that motion should be returnable, the order to show cause.

THE COURT: No. I want to explain to you that I think that when these criminal contempt cases come up it is

(43)

ORDER TO SHOW CAUSE AND EXHIBITS



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA :

-v- :

RICHARD HUSS, :

Defendant. :

- - - - - - - - - - - - - - - - - - - X

ORDER TO SHOW CAUSE

Re: 72 CR. 778 A.G.

Sufficient cause appearing therefor, it is hereby ORDERED pursuant to Rule 42(b), Federal Rules of Criminal Procedure that Richard Huss show cause before this Court on July 3, 1973 at 10:30 a.m. in Room 110 of the United States Courthouse, Foley Square, New York, New York, why he should not be adjudged in criminal contempt of Court for his wilful refusal to answer questions put to him at the trial of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778, as more fully set forth in the accompanying affidavit.

IT IS FURTHER ORDERED that service of this order to show cause on Richard Huss on or before 5:00 p.m., June 28, 1973, be deemed good and sufficient service.

IT IS FURTHER ORDERED that, for the reasons stated by me in open Court, Richard Huss be arrested by the United States Marshal, and

IT IS FURTHER ORDERED that, for the reasons stated by me in open Court, bail shall be fixed in the amount of $50,000 cash or surety bond, and the defendant shall be remanded to the custody of the Attorney General or his duly authorized representative if he is unable to post such bail.

IT IS FURTHER ORDERED that the United States Attorney for the Southern District of New York or any Assistant United States Attorney be and they hereby are appointed and directed to prosecute said Richard Huss on behalf of this Court.

Dated: New York, New York

June 28, 1973

SO ORDERED:

ARNOLD BAUMAN
United States District Judge

(45)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

-v- : AFFIDAVIT

RICHARD HUSS, :

Defendant. :

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

HENRY PUTZEL, III, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and, as such, was in charge of the prosecution of the case of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778. I make this affidavit in support of the Government's application for the issuance of an order directing Richard Huss to show cause why he should not be held in criminal contempt for wilfully refusing to obey the Court's lawful order to answer questions put to him during the criminal trial of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778.

2. On May 30, 1973, a jury was duly empaneled in this District to hear the criminal case of United States v.

Stuart Cohen and Sheldon Davis, 72 Cr. 778. On June 8, 1973 Richard Huss was called to testify as a witness in said case and was duly placed under affirmation.

3. On June 8, 1973, after Huss had asserted his privilege against self-incrimination the Court conferred immunity upon him pursuant to Title 18, United States Code, Sections 6002 et seq. Thereafter, the said Richard Huss did wilfully and without just cause refuse to obey the Court's lawful order to answer the questions put to him by counsel for the Government. The Court thereupon adjudged Huss in civil contempt of Court pursuant to Title 28, United States Code, Section 1826 and ordered that he be imprisoned until he should purge himself of his contempt by answering the questions as ordered by the Court or until the conclusion of said trial. The Court also explicitly advised Huss at that time that, should he persist in his wilful refusal to obey the Court's lawful order, he would be subject to punishment for criminal contempt.

4. On June 26, 1973 the United States Court of Appeals for the Second Circuit affirmed the judgment of civil contempt. On June 27, 1973, Richard Huss was again placed under affirmation in the trial of United States v. Stuart Cohen and Sheldon Davis, 72 Cr. 778 and thereupon

repeated his refusal to answer the questions previously put to him and refused to obey the Court's further order to answer additional questions. The Government thereupon stated that it was unable to proceed with the prosecution of the charges at bar, and the trial was thereupon terminated.

5. I attach herewith and incorporate as a part of this affidavit the transcripts of proceedings of June 8, 1973 (Exhibit A) and of June 27, 1973 (Exhibit B).

6. No prior application has been made for this relief.

WHEREFORE, it is respectfully requested that the order to show cause be issued.

HENRY TUTZEL, III
Assistant United States Attorney

Sworn to before me this
28th day of June, 1973

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975

RICHARD HUSS, called as a witness by the Government, duly affirmed by the Clerk of the Court, testified as follows:

MR. ARTHUR MILLER: May it please the Court, my name is Arthur Miller, attorney for Mr. Huss.

At this time your Honor, the authority of Tane against United States, I would like to request the Court that they refrain from calling Mr. Huss as a witness, and that the Government learned of Mr. Huss through illegal wiretapes and illegal pressure put on specifically the Jewish Defense League offices and the previous witness in this case Mr. Sheldon Seigel.

MR. JAMES: Your Honor, with respect to Mr. Huss, we have an affidavit with regard to the CIA wiretaps which we were directed to get last time we were in Court.

That affidavit which is Court Exhibit 3 covers Mr. Huss.

We have the telegram from the Department of Justice on the 29th of May 1973 indicating that there were no--there was no electronic surveillance of Mr. Huss.

We have the former FBI representations which were made during the hearing in February to the effect that there were no overhearings of Mr. Huss. We will have an affidavit which we will put before the Court from the Department of

Justice indicating that there were no electronic overhearings of any kind of Mr. Huss.

THE COURT: How about his point that you learned of his existence through illegal wiretaps?

MR. JAFFE: We are prepared at this time, your Honor, to show that the existence of Mr. Huss was obtained from Sheldon Seigel by Detective Parola. Detective Parola is here and we are ready at this time to go forward.

Your Honor, with regard to his allegation of pressure on Mr. Seigel, the Government would assert that at this time Mr. Huss has absolutely no standing to raise that issue.

His standing would not come into being until he was held in contempt.

With regard to the wiretap issue he does have that standing and the representations which are made by the Department of Justice would indicate that there was no electronic surveillance on which he was overheard.

MR. SLOTNICK: Your Honor, with regard to that, as I read Tane, the defendants have standing to move to suppress any evidence, witness, or material that they feel has been brought into the courtroom based upon an illegal action of the Government, so on behalf of the defendants, I

so move to exclude this witness from testifying based upon the illegal activities of the Government.

MR. [illegible] believe under Alderman that is the correct position.

THE COURT: Denied.

All right. Go ahead.

DIRECT EXAMINATION

BY MR. JAFFE:

xx Q Would you state and spell your name, please?

A Richard Huss.

Q Will you tell us where you live?

A 5 Staten Island Boulevard.

Q Would you tell us your age?

A I respectfully decline to answer this series of questions on the grounds that my testimony may tend to incriminate me. Also it is my understanding of the Jewish Law that I am prohibited from testifying against another Jew in a non-Jewish tribunal and on the grounds that any contrary interpretation of Jewish Law made binding on me is itself a further violation of basic Jewish Law.

MR. JAFFE: Your Honor, at this time we would hand up to the Court an application we attempted to file last week with regard to immunity for Mr. Huss.

I will hand a copy of that application to Mr. Miller, and I will hand to the Court a letter, the original of a letter from Henry E. Petersen, Assistant Attorney General, authorizing the United States Attorney to make that application.

A copy of that letter is included in the application.

THE COURT: Have you shown this order to his lawyer?

MR. JAFFE: Yes, I have, your Honor.

MR. MILLER: Yes, I have it, your Honor.

THE COURT: I am inclined to change one word of this, Mr. Jaffe. In the last paragraph of the order, it says this order shall become effective only after the date of this order.

I am inclined to change the word "date" to "after the signing of this order."

MR. JAFFE: I agree, your Honor.

MR. SLOTNICK: Your Honor, I would on behalf of the defendant, and I state that I believe I have standing to challenge this--

THE COURT: I don't believe you have standing to talk about whether I could confer immunity on this man who is represented by counsel. I don't believe so at all.

MR. SLOTNICK: This is a way of attempting to force him to give evidence against my client.

THE COURT: But he is not your client.

MR. SLOTNICK: Then, your Honor will not allow me to make an objection with regard to immunity?

THE COURT: That's correct with respect to this, yes.

MR. ZWEIBON: May we both have an exception to that, your Honor?

THE COURT: Yes.

MR. JAFFE: I believe your Honor we would hand that to the clerk and have it filed.

MR. JAFFE: With regard to the second prong of Mr. Huss' statement that he just read, that he declines to answer questions on the basis of his religious beliefs, we would direct the Court's attention to the opinion in United States versus Seeger.

THE COURT: I am familiar with it and I adhere to it.

BY MR. JAFFE:

Q Mr. Huss, directing your attention to January 26, 1972, specifically, to the morning of that day, did you see the defendants Stuart Cohen and Sheldon Davis on that day?

THE COURT: Before you answer that question, Mr. Huss, I want to explain to you that I have just signed an order which confers immunity on you, and which prevents the use of anything you say against you.

I am going to give you a moment or as much time as you like, Mr. Huss, to talk to your lawyer so that he can explain to you the legal significance of what it is I have done in signing this order I have just signed.

You may step down.

MR. JAFFE: Your Honor, before the witness steps down, would the Court also admonish the witness that it is the Court's opinion that the other basis stated for refusal to answer, specifically the religious grounds, is not a valid basis and that he consult about that?

THE COURT: Yes, Mr. Huss, your lawyer knows the case of United States v. Smilow, I have no doubt, but another Judge of this Court has ruled upon that same objection in the case of Mr. Smilow, and has held it to be not a valid ground for refusal to answer.

The substance of what I have said is that I agree with the ruling of that Judge, Judge Weinfeld by name, with respect to the claim based upon religious scruples, and advise you that it is not a proper basis on which you may

refuse to answer.

MR. MILLER: May I please the Court, I do not have a copy of the second Smilow decision. I had a different copy which does not discuss the religious issue. However, I would like to point out that I believe that the religious issues will be raised which Mr. Muss is relying on, while similar to the issues raised by Mr. Smilow, are in effect different, and would like to have an opportunity for this witness to be heard on the religious issues at this time.

THE COURT: I will permit it.

MR. MILLER: Thank you.

THE COURT: The issue by the way, as I remember it sir, is exactly the wone Judge Weinfeld wrote about in the Smilow case, namely, as I remember the opinion, that Smilow claimed that it would violate his Judaic beliefs to inform, and I understand that to be the basis of Mr. Muss' refusal.

Am I right about that?

MR. MILLER: It is similar but it is different in very material aspects.

THE COURT: How does it differ?

MR. MILLER: Well it's not that he's not willing to inform. Or there are two bases for his refusing to testify. The first is whether or not this Court in fact

does have jurisdiction over two Jewish parties. I believe Judge Weinfeld's decision in effect has ruled that under Jewish Law this Court does in fact have jurisdiction over Mr. Huss to testify or Mr. Smilow to testify.

However, Jewish Law is very, very settled on the fact, and I quote from a book called the Code of Jewish Law, which is a compilation of law effecting the conduct of a Jewish person from the time he wakes up in the morning until the time he wakes up the following morning, and with respect to one's testimony in Court, it discusses the issue of whether or not Mr. Huss is even permitted to be called in this Court, but as you stated Judge Weinfeld has ruled that he is required to testify.

THE COURT: I might say that case has been affirmed by the Court of Appeals as I understand it.

MR. MILLER: However, the Jewish Law goes one step further. It does not permit a witness to testify in a non-Jewish Court where the punishment or the verdict against the defendants in the case, if they are Jewish, would be different than the verdict which would be rendered in a Jewish Court.

Now, Jewish Law states that testimony of a witness

who accepts a reward for testifying is null and void. It has no effect whatsoever. I submit to this Court that by granting of immunity upon this witness for his testimony, he has been rewarded with some form of remuneration, basically freedom from prosecution in case he should say anything which would incriminate him.

THE COURT: Freedom from the use of his testimony?

MR. MILLER: Use of his testimony, yes.

In view of the fact that he has received this grant of immunity from prosecution, according to Jewish Law, his testimony in a Jewish Court would be null and void; and since his testimony would not be admissible in a Jewish Court, Jewish Law goes further and states, and again I read--and if counsel requests, I can provide him with a copy--in effect it says that if a Jew testifies against another Jew who became liable to a larger sum--and the term larger sum is used with respect to monetary compensation but it holds equally true with respect to punishment for an act--

THE COURT: What makes you say that?

MR. MILLER: That is the interpretation.

THE COURT: You are talking about suits for money?

MR. MILLER: No, they are not talking about suits for money. They have used that word, that phrase. However, it deals with conduct in Court in general. There is no

specific limitation to it.

THE COURT: All right.

MR. MILLER: It states quite clearly that if a Jew will cause someone to be liable for a larger sum of money then he would be in a Jewish Court, he is not allowed to testify, a complete prohibition against testimony.

Going back, that his testimony is null and void, if this witness were compelled to testify in this Court, and giving testimony which in effect is null and void, he will in effect be bearing a false witness, which is in clear violation of a commandment in the Ten Commandments, which prohibits a witness from bearing false testimony.

Now, the Ten Commandments, or requesting a witness to take an act, affirmative act, which clearly violates a cardinal precept of his religion goes far beyond a mere interest of the State, of a police power of the State to have this witness testify.

This is asking him to violate a basic precept of Jewish religion.

THE COURT: Mr. Huss, you hear what your lawyer is saying, do you not?

THE WITNESS: Yes.

THE COURT: Is that the basis of your objection on religious grounds?

THE WITNESS: Yes, it is.

MR. MILLER: There is a second ground.

This witness has been advised by his spiritual leader that this Court does not have any jurisdiction whatsoever.

Now, I submit that Judge Weinfeld's decision may or may not be correct according to Jewish Law. However, Jewish Law is equally clear that one does not--when one has a question as to Jewish Law he consults his rabbi and his rabbi only. The decision he gets from his rabbi is completely binding upon him.

If he gets a decision he does not like or he wants an adverse determination, he is prohibited from going further and seeking additional rabbinical advice.

The basis for this really comes from the Talmud and a Tractate, which deals with the rules and regulations of conduct upon the Sabbath; and in the Talmud it states the story of one rabbi who held that Saturday where he is permitted to have a circumcision for a newborn baby, he is permitted to chop down trees and sharpen the knife--

THE COURT: Isn't it getting a little far afield?

MR. MILLER: It will lead right into it if your Honor will permit me.

The Talmud goes on and the commentary goes on to state that every other rabbi except for this one rabbi named Rabbi Eleazer, who lived in a town in Israel holds that this is a violation of the law of what you are permitted to do on Saturday.

The Talmud goes on to state that nevertheless the followers of this rabbi who folled his rules and cut down the trees and committed these acts on Saturday are rewarded with the highest reward permitted under Jewish Law, which in effect would be they are entitled to the world to come even though they violated the Sabbath, punishment of which is death, and the reason for it is that despite the fact that they violated the Sabbath they were worthy of this reward because they did one step which was even higher than the Sabbath and that was listening to their rabbi despite all admonitions to the contrary.

And again this book Code of Jewish Law, when it talks about the honor one should give--

THE COURT: I understand what you have said. Do you understand, Mr. Huss what your lawyer has said?

THE WITNESS: Yes, I do.

THE COURT: Is that too part of the basis of your refusal to answer on religious grounds?

THE WITNESS: Yes, it is.

THE COURT: All right.

MR. MILLER: If I may just quote, it says that a person must honor and revere his teacher more than his father because his father has given life in this world while his teacher prepares him for life in the world to come.

Now we know again that the Ten Commandments requires the honoring of one's father. Yet, according to Jewish Law, which is uncontradicted by any rabbinical authorities whatsoever, the honor which one is to give to his rabbi by following every command which he states and every interpretation which he gives you, is greater than even the honor which is required of you in the Ten Commandments.

I submit to this Court that the principles which this witness is relying on are basic cardinal precepts of Jewish Law that cannot be refuted by any other religious authorities.

The Supreme Court of the United States has stated in the case of Sherbert v. Verner--

THE COURT: Do you have the citation?

MR. MILLER: 384 United States reports 398.

In that court in that decision the Court decided that where a cardinal principle was involved of Jewish Law--it did not deal with Jewish Law--with a cardinal principle after religion was involved the Court would not while it

did not deal with a contempt citation in their issue, would not hold the defendant in violation of that law.

I submit that we have in this case clear instances of very, very cardinal principles of Jewish Law. In both instances they are derived from the Ten Commandments and for the Court to tell this witness that he is to take an act which violates this basic principle of Jewish Law is an infringement of his religious rights, the practice of his religion which is prohibited by the First Amendment to the Constitution.

THE COURT: The objection based on religious grounds is overruled.

T3 MR. MILLER: I except.

THE COURT: I would like you to talk to your client, please, explain to him -- you may step down, Mr. Huss -- the significance of the order I have just signed.

MR. TIFFE: Shall we proceed with Mr. Smilow?

THE COURT: We will take a five-minute recess because I want counsel to have an opportunity to talk to his client.

(Recess.)

THE COURT: Madam, if you do that again, the Court will direct the marshals to expel you. You in the front row. If that happens once more, the marshall will

exclude you from the courtroom.

THE MARSHAL: Yes, your Honor.

EXAMINATION BY MR. JAFFE:

Q Mr. Huss, directing your attention to the morning of January 26, 1972, did you see Sheldon Davis on that morning?

A I respectfully decline to answer this series of questions on the grounds that it is my understanding of Jewish law I am prohibited from testifying against another Jew in a non-Jewish tribunal and on the grounds that any contrary interpretation of Jewish law made against me is a further violation of the Jewish law.

THE COURT: Do you understand I have overruled that objection?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

Q Mr. Huss, on the morning of January 26, 1972, did you drive in a car with Sheldon Davis and other people from Brooklyn into Manhattan?

A I respectfully decline to answer --

THE COURT: You may say same declination.

THE WITNESS: Yes, your Honor.

THE COURT: You decline to answer on the same ground?

THE WITNESS: Yes, sir.

MR. JAFFE: Would you order the witness to answer that?

THE COURT: I order you to answer the question, Mr. Witness.

A Same declination.

Q Mr. Huss, on the morning of January 26, 1972, did you have a discussion with Mr. Davis and other individuals concerning the placement of an attache c... at the premises of either Hurok Concerts, Incorporated or Columbia Management Artists, Incorporated?

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled.

You may answer.

A Same declination.

THE COURT: I order you to answer.

A Same declination.

Q Mr. Huss, on the morning of January 26, 1972, did you go with an individual named Jerome ZellerKraut, also known as Jerry Zeller, to the offices of Hurok Concerts and there place an attache case and ignite it?

MR. SLOTNICK: I object to the question, one, A, as being improper and not binding upon my client and, B, as a continuation of a charade I find rather distasteful.

THE COURT: Overruled.

MR. SLOTNICK: There are members of the press in the courtroom and certainly we have --

THE COURT: If you continue to speak after I have ruled, sir, you are going to run into trouble.

MR. SLOTNICK: I haven't finished.

THE COURT: Yes, I have.

MR. [illegible]: Then I can't object. I object for the record, your Honor.

MR. ZWEIBON: I join in the objection.

THE COURT: Go ahead.

Q Would you answer that question, Mr. Huss?

A Same declination.

THE COURT: I order you to answer, Mr. Huss.

A Same declination.

Q Were you at any time on the morning of January 26, 1972, in the company of Sheldon Davis, Jerome Sellerkraut also known as Jerry Zeller, Murray Elbogen and an individual named Murray Elbogan?

A Same declination.

MR. SLOTNICK: Most respectfully again I object and say since your Honor doesn't want me to state for the record --

THE COURT: State it for the record.

MR. SLOTNICK: That those questions are not binding on my client and are aimed toward prejudicing my client and for each and every reason I stated before.

THE COURT: Overruled.

You may answer.

A Same declination.

THE COURT: I order you to answer, Mr. Huss.

A [illegible].

Q Mr. Huss, prior to January 26, 1972, within a period of time from about two weeks before that date, that is, from two weeks before January 26, 1972, through January 26, 1972, did you have any discussions with Sheldon Davis or Stuart Cohen or with the individuals Murray Elgoban, Jeffrey Smilow or Jerome Zallerkraut concerning placement of any attache cases or incendiary devices at either Hurok Concerts, Incorporated, or Columbia Artists Management?

MR. SLOTNICK: I object to the form of the question, one, it asks for conversations that have been allegedly out of the hearing of my client.

Two, it is a continuation of a charade I find to be very distasteful, and ask the Court at this point if

the witness is going to be held in contempt that that procedure be accomplished.

THE COURT: You are not his lawyer, sir.

MR. SLOTNICK: I am not his lawyer, but I am Mr. Cohen's lawyer.

THE COURT: I understand that. I don't regard this as a charade at all. He is asking questions that bear on the allegations of the indictment. The witness has consistently refused to answer and is heading in the direction of a contempt, and I shall deal with that at the appropriate time.

MR. [illegible]: May I join in the objection of Mr. Slotnick and say that the government by its parade of questions is assuming facts contained in the questions knowing perhaps that the declinations are coming and is trying the case for the Press and not for the Court's benefit.

THE COURT: I don't really think so and I am asking them to go no further.

MR. MILLER: I was going to suggest whether Mr. Huss has indicated he will rely on the ridiculous privilege and regard those rules which prohibit him from testifying, with all due respect to the power of this Court and continuing to ask him questions which we know he will

not testify to is just trying to build up the number of times by which he is disobeying the Court's command.

I feel that he is relying on one principle and no matter how many questions he is asked he is not going to answer them.

THE COURT: You may answer.

A Same declination.

THE COURT: I order you to answer.

A Same declination.

THE COURT: I don't really see much point in going on.

MR. JAFFE: We were going to inquire whether it was his intention to give the same declination if other questions were put to the witness.

THE COURT: You may answer that.

THE WITNESS: Yes.

MR. JAFFE: At this time we would ask that the Court make the finding that Mr. Huss is in contempt of this Court and ask that he be remanded to the custody of the Attorney General until such time during this proceeding that he be recalled and give testimony before this Court.

THE COURT: Before you say anything -- I will hear you, I could -- Mr. Huss, I find you in contempt of

this Court. There are two kinds of contempt that I want to tell you about.

One is civil contempt, which provides for your incarceration during the course of this proceeding but leaves the keys to the prison with you in that if you decide to answer at any time you will be released.

The second kind of contempt is a criminal contempt which does not look for answers but is meant as punishment for your contemptuous conduct in refusing to answer questions.

I instruct you, sir, that a civil contempt does not include criminal contempt.

I find the witness in contempt of court. I will hear you, sir.

MR. MILLER: With respect to your Honor's finding, it is our intention to file an appeal with the United States Court of Appeals on several issues, the first of which naturally are the religious issues and, second of all, on the authority of the taint by the United States, and based on these matters I request that the witness not be remanded pending a determination.

THE COURT: Explain your second argument to me, please, at a little greater length.

MR. MILLER: That they discovered the identity of this witness through wiretaps and pressure placed on the witness Seigel without which they would not have learned the identity of Mr. Huss.

THE COURT: I have already ruled to the contrary.

MR. MILLER: We intend to appeal on that issue.

THE COURT: But you are aware that I have ruled?

MR. MILLER: Yes.

THE COURT: To the contrary.

MR. MILLER: And it is our intention to appeal both issues and it is my request that pending final determination of this appeal in this case, that the witness Mr. Huss not be remanded pending the final determination on appeal.

MR. JAFFE: Your Honor, with respect to the issues on appeal, the government's position is both those issues are frivolous. With regard to the religious issue, that was decided by Judge Weinfeld, written on by Judge Feinberg in the Court of Appeals, and although subsequently the Smilow case was reversed it was reversed for other grounds than the religious determination grounds by Judge Feinberg and is still the law of the circuit.

With regard to the taint --

THE COURT: I must put on the record without any disrespect for anybody's religious beliefs, the fact that the matter has been determined, has been ruled upon by our Court of Appeals and in a legal sense then I am telling you I am using frivolous as a word of art, that I find that basis frivolous.

MR. MILLER: Your Honor, here is the decision written by Judge Feinberg and he dispels the religious issue in a footnote and I have no way of knowing whether he considered the same authorities or the same issues which I have raised. It is my understanding after speaking to the counsel named on the Judge's opinion that the same issues were not raised.

THE COURT: As I remember Judge Weinfeld's opinion, it dealt exclusively I believe and mostly with the informant aspect and the refusal was an additional problem, but I do not regard them of a sufficient degree of variation to regard them differently from the Smilow case.

MR. JAFFE: With regard to the second issue, your Honor, it is the government's position first that this witness had no right to raise any objection to any of the information as did the witness Smilow. However,

if the Court should find that he does have standing, which we certainly contend he doesn't, it is our position that the Court already held the hearing and made that determination with regard to Seigel.

THE COURT: That matter is in the Court of Appeals.

MR. JAFFE: That is correct. The issue, the standing issue is frivolous. If the Court wishes at this time we have Detective Porola available -- excuse me, your Honor.

(Pause.)

MR. JAFFE: Your Honor, I don't wish to belabor the issue as to standing. The point is that the wiretap taint issue that they seek to raise was raised with regard to the witness Seigel and that is on appeal.

With regard to this particular witness, he has no standing to raise the issues raised by Seigel and, therefore, that is the issue we contend is a frivolous issue on appeal.

THE COURT: I have previously ruled in connection with Seigel that it seems to me that the government was not led to him as a result of illegal wiretapping.

MR. JAFFE: That is correct, your Honor.

MR. PUTZEL: If I may be heard for one moment, I don't mean to tread on my brother Jaffe's toes, but it seems there is a very important distinction here. Let us assume for the moment that Seigel, for the purpose of this argument alone, was discovered by wiretaps. We would urge most strenuously that assuming that Seigel later was a person who gave us the information concerning Mr. Huss as he has claimed is the case, we would say that he has absolutely no standing to assert the wiretap claims of Seigel.

He is taking Seigel's position which he also contests before your Honor or. step beyond that, and I submit that the chain is much too weak to support his standing.

THE COURT: What is the key issue in the Seigel matter in the Court of Appeals in one sentence, if you can?

MR. PUTZEL: It will be a long sentence, your Honor.

I think the major issue before the Court of Appeals insofar as Mr. Seigel is concerned is that he had just cause to refuse to answer the Court's question.

THE COURT: On the basis of an agreement?

MR. PUTZEL: The agreement and other constitutional

violations and on the basis that his testimony was discovered and thereafter tainted by unlawful wiretaps.

MR. EDELOWITZ: If your Honor would like I have a copy of the brief we submitted if it might be helpful.

THE COURT: I notice is about an inch and a half thick, but I would like to have a copy, Professor, I really would.

MR. PUTZEL: The point insofar as Mr. Huss is concerned is solely the question concerning how Seigel was discovered and what he thereafter said to the government with respect to the identity of Mr. Huss as a co-conspirator in the Nuzac and Columbia firebombings.

Now, the Court has made a factual finding which is before the Court of Appeals concerning the discovery of Seigel.

But putting that to the side and assuming even [illegible] of our argument, --

THE COURT: I want to say that the reason I admitted Sheldon Seigel to bail last week was because I viewed the issue, and it was only on this narrow ground, although perhaps I didn't express it at the time, the narrow ground that we had not heard from the CIA and that I regarded it as an issue that was not frivolous.

That was the basis and I now so state if I didn't do it then, that I admitted -- on which I admitted Seigel to bail.

As far as your client is concerned; that issue is no longer in the matter. I certainly said to Professor Dershowitz last week that I regarded his Watergate approach as frivolous, I used that word at that time, and I am somewhat at a loss to see what I regard as a substantial reason why I should not commit this young man.

MR. MILLER: I know you sincerely believe the religious issue is frivolous as stated and I believe that this is a viable issue and if we take this case up on appeal and it is subsequently held that in the Smilow decision this issue was not dealt with on the same ground and in fact is held that Mr. Huss is not in contempt of court, yet if he is held in civil contempt in jail pending final determination of this issue in this case, the case itself may be over, in which case the civil contempt would be dismissed anyway, actually following the conclusion of the trial.

Now, in effect by remanding him at this time prior to appeal you are saying, in fact saying I have no right of appeal.

THE COURT: I am not saying that. I am saying I see no serious question on his appeal as in the case of

Professor Dershowitz's client last week with respect to the CIA.

MR. JAFFE: With regard to the appeal under 28 U.S.C. 126, that in the section that this witness has been held in contempt under, the Court of Appeals must under that section render a decision on appeal within 30 days.

MR. MILLER: It is my argument this case should be concluded prior to 30 days and within that 30-day period if the Court of Appeals in fact does rule in favor of Mr. Huss, he has no victory because he would be discharged anyway.

Furthermore, there is another consideration which I would like to put before this Court. Mr. Huss is presently a senior in high school, presently completing his studies and at this time, to make him, to remand him will in effect not allow him to take any final examinations, any regent examinations, in effect would be prohibiting him from graduating on time as against --

THE COURT: But the door to the prison lies in his mouth.

MR. MILLER: He is prohibited from testifying under religious law, he is not permitted with all due respect to the Court, and that is not at all an issue that

is adjudicated and which I feel are different from the issues raised in the Smilow decision, which to me deals with the Ten Commandants and which the Court in the Smilow decision dismissed with a footnote and I feel you cannot dismiss the Ten Commandments by a footnote and to incarcerate this witness prior to a final determination on this issue leaves him without a victory if in fact he is upheld.

THE COURT: Sir, one must very often do things that one does not enjoy doing when one is required and sworn to uphold the law.

I mustsay to you in conscience that I find your client in contempt, I find at least in my legal view his bases for appeal frivolous and, in these circumstances, the law requires me to order that he be committed to the custody of the Attorney General until such time as he answers the questions which he has refused to answer.

MR. SLOTNICK: Your Honor, on behalf of Cohen I object to that. I respectfully request that you [illegible] allow at least at this stage of the proceeding a hearing, as Mr. Jaffe has so eloquently indicated to the Court, that the detective be called, the one individual who can testify whether the names or the presents were obtained through illegal means and respectfully request that the

Court commence that hearing.

THE COURT: His lawyer hasn't asked for that.

MR. SLOTNICK: I believe I have standing.

THE COURT: I don't.

MR. SLOTNICK: Therefore your Honor is cutting me off and asking me not to continue.

THE COURT: I am just saying I don't believe you have standing to request a hearing which affects the matter you are talking about. That is for his lawyer to decide and his lawyer to ask me to do.

All I am saying is in my view, Mr. Slotnick, you do not have standing to make that application.

MR. SLOTNICK: At any rate, that is the reason I raise the issue and I make the objection on behalf of the defendants, simply the fact that the alleged coercive effect upon Mr. Huss, if there be any, may inure to the detriment of my client as a result.

THE COURT: It may, Mr. Slotnick, but the very business of civil contempt means tohave a coercive effect on the witness, that is what civil contempt is all about. It says if you want to get out of jail, answer the questions, and when you do, out you come. It means to be coercive, that is what this law is about.

MR. SLOTNICK: I am fully aware and that is for the life of this trial. When this trial ends the witness --

THE COURT: I say for the duration of this proceeding.

MR. SLOTNICK: However, it is my position --

THE COURT: He may very well and indeed the probabilities are that if he persists he will be then faced with a criminal contempt.

MR. SLOTNICK: That is a problem I cannot delve into.

THE COURT: I hope it will not be necessary. I hope this young man will take the opportunity which the law affords him for his own release based on testifying. I can't tell you how much I hope he does, but that decision rests with him, sir.

MR. SLOTNICK: That is for the witness's conscience. However --

THE COURT: Yes, it is.

MR. SLOTNICK: I make my application and I except to the proceedings and except to the holding of this witness in contempt and I place it on the record for whatever purpose it may serve at this stage of the proceeding.

MR. JAFFE: Your Honor, may we have permission to recall this witness prior to the conclusion of these proceedings?

THE COURT: Of course you may recall him, but basically it is he who has got to decide whether or not he is going to open the doors for himself. I want my ruling perfectly clear if I may. The witness is held in civil contempt, of course, and is ordered to the custody of the Attorney General of the United States unless and until he answers the questions which he has so far refused to answer and that period of incarceration is to last the duration of this trial.

MR. MILLER: Your Honor, I respect your decision, but I would like to point out one factor I have touched on. This witness was served with a subpoena in January to appear at the trial which was scheduled to commence, I believe, February 5.

At that time he was in the middle of a school term and the burden upon him was not -- the fact remains we now have a set of circumstances four months later which true as you stated the key to opening the door is in his hands, but because of delays, procedural matters which were not strictly my client's happening, really, and the fact that he appeared back in February under the same

grounds would have refused --

THE COURT: The delays were necessary, the delays were occasioned by a hearing that took almost two weeks, I know there were delays.

MR. MILLER: I know there were delays --

THE COURT: Just a minute, please. There were delays by my writing a rather lengthy opinion dealing with the objections that were raised and delays occasioned by the disposition of other business of this Court. Yes, there have been delays.

MR. MILLER: These delays have placed my client in a position where really it is imposing on him a burden far greater than the contempt burden. He is in a position where he is in effect prohibited from going to school, taking his final examinations, taking his regents examinations and graduating from school.

THE COURT: You are reciting all of the factors that I, believe it or not, find terribly painful, but you are not reciting anything that has to do with the law in this case.

MR. MILLER: You have already ruled, I know.

THE COURT: Yes.

EXHIBIT "B" TO ORDER TO SHOW CAUSE

MR. PUTNEL: Perhaps we could ask that Mr. [illegible]low's counsel and he also confer at this time so that [illegible]on't waste further time.

THE COURT: Yes.

MR. SLOTHICK: To continue with expedition, [illegible]ould object to each and every question asked of the [illegible]esses by the government based upon my prior motion [illegible]purposes and also based upon the fact that they have been [illegible]ced as witnesses and there is no indication that they [illegible]ld change their stands.

THE COURT: Yes.

MR. EMERSON: For both sides.

MR. SLOTHICK: That will be a continuing [illegible]ection throughout their testimony.

THE COURT: I understand.

[illegible]I A R D H U S S, having been duly affirmed, testified as follows:

[illegible]CT EXAMINATION

[illegible]A. JOHN:

Q Mr. Hass, do you know an individual named Sheldon [illegible]?

A The Court of Appeals has ruled that my prior [illegible] matter testimony in this proceeding on the ground [illegible] my questions would [illegible] violation

of the teachings of my religion and cannot be recognized by an American court as a basis for not testifying. With all due respect to the decision of the Court of Appeals and of the honorable tribunal, I find that the cardinal precepts of my religion must take precedence in my mind. Therefore I respectfully decline to answer any questions on the religious principles stated in my prior declinations before this honorable tribunal.

THE COURT: I direct you to answer. I order you to answer.

THE WITNESS: Same declination.

MR. [illegible]: Excuse me just a minute, Judge.

THE COURT: Before this goes any further, Mr. Huss, I want to tell you something: I explained the last time that your failure to answer questions when I have ordered you to answer constituted contempt of court. I told you that my having committed you for civil contempt does not preclude the bringing of charges of criminal contempt against you.

I again want to advise you of that and I want to make other things abundantly clear to you, Mr. Huss.

One, I am going to ask the United States Attorney to comply with the provisions of Rule 42B and proceed against you for criminal contempt if you persist in [illegible]

answer. I for one regard your refusal to answer as criminal contempt.

I want further to advise you, Mr. Huss, that for criminal contempt there is no limit upon the amount of punishment which can be imposed upon you for that crime. That clear?

THE WITNESS: Yes, your Honor.

Q Mr. Huss, do you know an individual named Stuart Cohen?

A Same declination.

MR. JAFFE: Would your Honor direct the witness?

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Do you know an individual named Murray Elbogen?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Do you know an individual named Jeffrey Smilow?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Do you know an individual named Sheldon Seigel?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same.

Q Do you know an individual named Jerome Zellerkraut?

THE COURT: Yes?

MR. ZWEIBON: Your Honor, I think we have gone --

THE COURT: I don't think so. Go ahead.

Q Do you know an individual named Jerome Zellerkraut?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Directing your attention to the 25th of January, 1972, did you see Sheldon Davis, Stuart Cohen, Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Zellerkraut?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Directing your attention to the 26th of January, 1972 did you see Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Zellerkraut?

A Same declination.

THE COURT: I want to again advise you that your refusal to answer these questions over my order constitutes in my view criminal contempt of court, and I want you to have that in mind.

I now order you to answer.

THE WITNESS: Same declination.

Q Directing your attention, Mr. Huss, to the morning of January 26, 1972, would you tell the Court who you saw, that is, what persons you saw on that morning?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

MR. MILLER: Excuse me, your Honor. The witness has made it clear in my mind that he will not answer. I see no purpose in this continuing.

THE COURT: Let me tell you what the purpose is. Someone has committed a dastardly, vicious, unforgivable, unforgettable crime. Someone is frustrating the administration of justice in a case that in my mind involves murder. People who deliberately do so will learn the power of the law even if there are those who have literally gotten away with murder.

Proceed.

Q Mr. Huss, on the morning of January 26, 1972 did you go in a motor vehicle with Sheldon Davis, with Jeffrey Smilow and Murray Ribogen and with Jerome Zellerkraut and drive in an automobile from Brooklyn to Manhattan?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Had you prior to the morning of January 26, 1972 agreed with Sheldon Davis and Stuart Cohen that you and Jerome Zellerkraut would go to the offices of Sol Hurok?

A Same declination.

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled, same order. I order you to answer.

THE WITNESS: Same declination.

Q Mr. Huss, did you on the morning of January 26 deliver any attache case along with Jerome Zellerkraut to the offices of Sol Hurok?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

THE COURT: I again advise you that your continued refusal to answer these questions over my direction constitutes criminal contempt of court.

Go ahead.

Q Mr. Huss, prior to the morning of January 26, 1972 or on the morning of January 26, 1972 did you have any discussions with [illegible], Sheldon Saigal, Jerome Zellerkraut, Murray Plavin or Jeffrey Smilow about

carrying an attache case to the offices of Hurok Concerts, Incorporated?

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled.

Answer, please.

THE WITNESS: Same declination.

THE COURT: I direct you to answer.

THE WITNESS: Same declination.

Q Mr. Russ, were you ever part of any plan to deliver any incendiary devices to either Hurok Concerts, Incorporated or Columbia Artists Management on the morning of January 26, 1972?

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled.

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

MR. JAFFE: Your Honor, may I have a moment?

THE COURT: Yes.

(Pause.)

THE COURT: I want the record to indicate at this [illegible] that a warrant has been issued for this individual

previously.

Are you aware of that, Mr. Huss?

THE WITNESS: Yes.

THE COURT: And you have been aware of that all morning, have you not?

THE WITNESS: Yes, your Honor.

MR. ZWEIBON: If your Honor please, for the sake of the record I don't want to pop up everytime with this type of objection and --

THE COURT: You may rise every time you have an objection to make.

MR. ZWEIBON: So that we will make it in duet.

THE COURT: What is on your mind?

MR. ZWEIBON: The same things, the leading of the witness, the matter of form, the length of this type of interrogation.

THE COURT: Overruled.

Q Mr. Huss, on the morning of January 26, 1972 did you leave an incendiary device contained in a black attache case in the offices of Sol Hurok, Hurok Concerts, Incorporated?

A Self-explanation.

THE COURT: I order you to answer.

THE WITNESS: Self-explanation.

Q Mr. Huss, on the morning of January 26, 1972 at around 9:30 did you meet in Manhattan with Jerome Zellerkraut, Jeffrey Smilow and Murray Elbogen?

MR. SLOTHICK: I object to the form of the question as not being binding on my client.

THE COURT: Overruled.

MR. ZUBIRON: Same objection.

THE COURT: Overruled.

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

MR. JAFFE: At this time the government would ask the Court, pursuant to Rule 42B, to orally notify this witness that he is to be held in criminal contempt pursuant to Rule 42B and Sections 401 and 402 of Title 18, United States Code?

We would state to the Court that we are at this time ready to proceed forthwith with a trial for criminal contempt of the witness Richard Huss.

THE COURT: I want to tellyou, Mr. Huss, as I have throughout your examination this morning, that your failure to answer the questions put to you constitutes in my judgment criminal contempt.

However, so far as the United States Attorney

... concerned, because of the seriousness of this criminal contempt, I think that the United States Attorney should proceed on papers as indicated in Rule 42 B, namely, that part "or on application of the United States Attorney by an order to show cause or an order of arrest."

You have made the application and since you make the application I ask you to comply with Rule 42B and proceed by order to show cause or an order of arrest so that the order to show cause, to be perfectly frank with you, will specify in writing for this man what it is he is facing. Obviously this proceeding will be a jury proceeding.

MR. GIBSON: That is correct.

THE COURT: Because it is inconceivable to me that anybody would be thinking of proceeding in a manner that would limit punishment, if this man is guilty, to six months, and therefore I want every letter observed. I want him proceeded against in writing. I want the case to proceed to a jury trial and I want the Judge, whoever he is, to have in mind my views as I have expressed it and previously this morning of the seriousness with which I view the frustration of a murder prosecution. People may do that, but the law will make them pay.

MR. [illegible]: Your Honor, with regard to Rule 42 the government would ask that -- and we wil comply with

.r Honor's direction to proceed on papers, but the
..rnment would ask that since under Rule 42B notice can
given orally by the Judge in open court in the presence
the defendant, and he will be a defendant, being cited
: criminal contempt.

THE COURT: I have so notified him, it seems to
, several times.

If he has misunderstood me I so notify him now.

You will be a defendant in a criminal contempt
..eeding. That is clear, isn't it, Mr. Fuss?

THE WITNESS. Yes, it is.

MR. JAFFE: We would ask your Honor that bail
.. fixed for the defendant pursuant to that rule.

THE COURT: He isn't in custody yet. He hasn't
.en arrested on this charge.

MR. JAFFE: What we will ask, your Honor, is
that he be arrested at this time. We will serve him with
.pers this afternoon. I believe under the rule, under
.le 42B, the oral notice is sufficient to cause the ar-
.st and we will serve him with papers this afternoon.
.k at this time that he be placed under arrest and we
. that bail be fixed as the rule provides.

THE COURT: The marshal will take him into
.stody then on your complaint, I take it.

MR. JAFFE: That is correct, your Honor.

THE COURT: All right, I will hear you as to bail. I will hear you, Mr. Jaffe.

MR. JAFFE: Your Honor, excuse me just a moment.

MR. MILLER: With respect to bail, your Honor, I think Mr. Putzel will agree that in the past this witness even prior to being served with a subpoena has at all times cooperated with making his appearances on time. He has never at any time not cooperated with respect to making his appearances.

As a matter of fact, Mr. Putzel has commented to me in personal communications with respect to the witness' cooperation. Because of the witness' cooperation Mr. Putzel has, when the witness was scheduled to appear in court prior to his incarceration, waived the reporting date at the time of the subpoena. He says he will call me. He knows that I will get in touch with the witness and the witness will be there.

In view of the witness' continued presence in court I feel that he can be released in his own recognizance to prepare this matter.

THE COURT: Do you understand that he is facing punishment without limit?

MR. MILLER: I understand that.

THE COURT: And I am to release him on his own recognizance?

MR. MILLER: He has at all times appeared. He has never failed to appear. He has appeared and cooperated with Mr. Putzel prior to being served with a subpoena.

THE COURT: I am not going to get into the number of people who have gone to Israel who have been connected with this case, but I am aware of them and I will see that bail is fixed in such an amount as to ensure that Mr. Huss is here to stand trial for criminal contempt.

MR. JAFFE: May I be heard, your Honor?

THE COURT: Yes.

MR. JAFFE: Your Honor is aware of one of the circumstances which we wanted to point out and we would like to stress to the Court.

We have at least three witnesses, who are essential witnesses to the government, who are not available to the government. I know that two of them are in Israel. One of those witnesses was served with a subpoena and failed to comply with the order, has not appeared in the United States.

Another one of those witnesses is some place in Israel but is one step ahead of the people who are trying

o serve him.

In addition, Elbogen, who is another witness hat the government sought to obtain, is nowhere to be found, t least to compel his attendance here in the court. That s one circumstance.

There has been a mysterious disappearance of witnesses to Israel and elsewhere in the United States so that they are unavailable to the government.

In addition, the circumstances of this particular defendant now are markedly different than they were when he was merely a witness. He faces, as your Honor has already pointed out, a sentence without limit if convicted for criminal contempt. He is involved or he is charged with being involved with obstructing any type of administration of justice now by refusing to give this court essential testimony bearing on an absolutely heinous crime.

In those types of circumstances, given the nature of the crime, given the propensity and the involvement of others to flee and not to appear, the government is compelled to ask for bail in the amount of $50,000 cash or surety bond.

MR. MILLER: Your Honor, with respect to the government's request prior -- Mr. Jaffe stated that the location of the witness and the circumstances under which

he appears have changed. Prior to the serving of a subpoena it was made clear to him the potential consequences of his refusal to cooperate.

Nevertheless, prior to the serving of the subpoena he was at that time theoretically capable of fleeing and going to Israel if he intended to do so. Despite that he made his appearances, did not depart prior to the service of the subpoena, voluntarily appeared at Mr. Putzel's offices for questioning at this time fully aware of the potential consequences which may arise.

Nevertheless he chose not to flee, not to disappear and he did cooperate.

I submit that the motion that Mr. Jaffe makes for $50,000 bail would be excessive.

THE COURT: He has every incentive to flee now that he didn't have before. He is a defendant.

MR. PUTZEL: At that time he was aware of the possibility and it was made perfectly clear to him.

THE COURT: Now it is a reality. He is a defendant in a most serious criminal case.

Because of the reasons I have previously given -- I don't see any necessity for spreading them on the record again. He did not frustrate a case of spitting on the sidewalk. He has frustrated a case of murder,

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NOTICE OF MOTION FOR DISCLOSURE AND TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-against-	:	NOTICE OF MOTION FOR DISCLOSURE AND TO DISMISS
RICHARD HUSS and JEFFREY SMILOW,	:	
Defendants.	:	

SIR:

Please take notice that on the annexed affidavit of Eve Cary, sworn to the 2nd day of November, 1973, the undersigned will move this court at a motion term thereof to be held before the Hon. Thomas P. Griesa, United States District Judge, at a time and place to be set by the Court, at the United States Courthouse, Foley Square, New York, New York, pursuant to Rules 12 and 16 of the Federal Rules of Criminal Procedure

(a) to disclose statements of the defendants made to government personnel;

(b) to dismiss the charges upon the ground that the requirement to testify violates the constitutional rights of defendants and that the federal contempt powers are unconstitutional;

and for such other and further relief as to the Court seems just and proper.

(97)

Dated: 2 November 1973

Yours, etc.

Eve Cary

PAUL G. CHEVIGNY
EVE CARY
Attorneys for Defendants
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

TO: PAUL J. CURRAN
United States Attorney
Federal Courthouse
Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

Plaintiff, :

-against- : AFFIDAVIT

RICHARD HUSS and JEFFREY SMILOW, :

Defendants. :

- x

State of New York)
: ss.:
County of New York)

EVE CARY, being duly sworn, deposes and says:

1. I am an attorney with offices at 84 Fifth Avenue, and I am one of the attorneys for the defendants herein. I make this affidavit in support of their motion to disclose state-

ments and to dismiss the charges.

2. This is essentially a legal matter, as to which very few factual allegations here are relevant or necessary. On information and belief, government records and testimony of the defendants will show that defendants made statements to government interviewers in this case. Testimony now may subject one or more defendants to prosecution for <u>previous</u> statements, as set forth in the accompanying memorandum of law. The motion to dismiss will be partly based on this issue.

3. In addition, defendants contend that the total discretion with relation to sentencing afforded by the law of contempt, permitting an endless sentence, renders the contempt power unconstitutional as a denial of due process of law.

Eve Cary
EVE CARY

Sworn to before me this
2nd day of November, 1973

Bruce Ennis
NOTARY PUBLIC

BRUCE J. ENNIS
Notary Public, State of New York
No. 31-6191955
Qualified in New York County
Commission Expires March 30, 1974

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New York Times 6/6/73 p. 1

Spying Missions and 2 Wiretaps Laid to Ehrlichman by Officials

By SEYMOUR M. HERSH

Special to The New York Times

WASHINGTON June 5—John D. Ehrlichman, President Nixon's former chief domestic adviser, authorized a series of espionage missions and at least two previously undisclosed illegal wiretaps beginning in 1969 that were carried out by an ad hoc White House intelligence group, officials knowledgeable about the Watergate investigation said today.

In addition, the officials said, detailed planning for a number of White House-ordered burglaries was authorized by Mr. Ehrlichman, although it could not be learned whether any such burglaries—including a planned foray into the Brookings Institution here—actually took place.

Most of the operations were coordinated by John J. Caulfield and Anthony T. Ulasewicz, two former New York City policemen who began working for the White House in early 1969, the officials said, including an investigation into the background of Mario Biaggi, who was defeated in yesterday's New York mayoral primary.

Mr. Biaggi, as a freshman Representative from the Bronx in 1969, bitterly criticized as "insulting" to Italian-Americans an early Nixon crime message to Congress calling for an attack on organized crime.

Continued on Page 35, Column 5

In addition, Mr. Ehrlichman's and Mr. Caulfield's informal White House group—described by knowledgeable sources as a precursor of the 1971 "plumbers" operation set up by Mr. Nixon to investigate the Pentagon papers leak—also questioned a number of participants in and eyewitnesses to the massacre at My Lai in South Vietnam in late 1969 or early 1970 to determine if the first newspaper accounts of the atrocity were correct.

One Government investigator said that a full description of the White House group's work would be provided to the Senate Watergate committee by John W. Dean 3d, the former White House counsel, who is scheduled to testify next Wednesday, barring court intervention.

Testimony by Caulfield

In his televised testimony last month before the Senate Watergate committee, Mr. Caulfield, a former undercover policeman in New York, gave a far from complete description of his initial assignment inside the White House.

"During the first three years," he said, "first on orders from Mr. Ehrlichman and later, in some instances, on orders from Mr. John Dean, Mr. Ulasewicz, under my supervision, performed a variety of investigative functions, reporting the results of his findings to the White House through me. I do not fully recall all of the investigations performed in this fashion."

Officials said that, in addition to about 18 clandestine intelligence missions, Mr. Caulfield and Mr. Ulasewicz were directly involved in the installation of a wiretap on telephone lines leading to the Georgetown residence of Joseph Kraft, the syndicated columnist.

A source who was closely involved said that the wiretap was installed in early 1969 at the express direction of Mr. Erlichman. "Caulfield didn't do it personally," he said, "but got someone else to look at it."

At one point before the installation of the wiretap, the source said: "Caulfield asked Ehrlichman why they [the White House] didn't go to the F.B.I. since he had been told to put it in for national security purposes."

He was told by Ehrlichman, "Well, the F.B.I.'s a sieve. Things get out that way.'"

A wiretap was installed and began to operate, the same source said, although Mr. Kraft was out of town at the time. Before the columnist returned, he said, Mr. Ehrlichman got in touch with Mr. Caulfield "and said to forget it; they had it another way."

The source said that Mr. Caulfield assumed that the White House had prevailed upon J. Edgar Hoover, then the director of the Federal Bureau of Investigation, to take over the bugging of Mr. Kraft.

Mr. Caulfield ordered his men to return to the Kraft residence and remove the wiretap, the source said, a high-risk operation involving the use of a ladder outside the second floor of the home.

Mr. Caulfield knows of at least one other wiretap that was installed on Mr. Ehrlichman's orders outside the normal F.B.I. channels, the official source said. That wiretap involved someone "in the family," he added cryptically, in an apparent reference to someone in the Administration.

It could not be learned whether the Federal prosecutors in the Watergate case were planning to conduct a separate investigation into the allegations of illegal wiretapping.

Both the prosecutors and the Senate Watergate committee are known to have received full accounts of the ad hoc White House group's activities from Mr. Dean, Mr. Caulfield and Mr. Ulasewicz.

One closely involved person said that the planned break-in at the Brookings Institution, a liberal Washington research group, was discussed sometime in 1971, Mr. Caulfield was told, the source said, that high White House officials "wanted some papers out of somebody's file." He did not know, he said, whose file was involved.

It has been widely reported that President Nixon personally authorized the wiretapping of 13 National Security Council and Pentagon aides as well as four newsmen in May, 1969, after what officials described as a serious news leak.

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There is some evidence that Mr. Caulfield's ad hoc group was supplanted, at least in some aspects, by the plumbers operation, which was organized in July, 1971.

In a civil suit deposition released today, Mr. Ehrlichman is quoted as commenting that in September, 1971, G. Gordon Liddy, the former member of the plumbers group who later led the Watergate break-in team, was initially introduced "as the new man in place of Caulfield."

And Mr. Caulfield, in his Senate testimony, has noted somewhat plaintively that "in the spring of 1971, I began to notice that, for some reason, the amount of investigation work handled by Ulasewicz through me had diminished."

One closely involved source said that one of the main functions of Mr. Ulasewicz, who had been hired through Mr. Caulfield after spending 20 years in police work, was to attempt to infiltrate large demonstrations in Washington. "Tony would just stand around with them and listen," the source said. "It was silly and they might just as well have had the local police do it."

It has been previously reported that Mr. Ulasewicz was hired by Mr. Ehrlichman after a clandestine meeting in mid-1969 at La Guardia Airport and paid in cash by Herbert W. Kalmbach, who was then President Nixon's personal attorney. The funds for Mr. Ulasewicz were reported to have been authorized by H. R. Haldeman, the former White House chief of staff.

Both Mr. Caulfield and Mr. Ulasewicz achieved national prominence during the first of the televised Senate Watergate hearings last month when it was alleged that they had both participated in a White House-directed effort early this year to offer executive clemency to James W. McCord Jr., one of the Watergate conspirators, in return for his silence.

One knowledgeable official said that most of the Caulfield-Ulasewicz assignments "involved specific events that already happened." He added, "They were just checking out press reports to seek what else they could learn that wasn't in the newspapers—like My Lai."

"That's not illegal," the official declared.

Asked if Mr. Ehrlichman was directing the White House intelligence operation, the official said: "Oh God, yes. Caulfield wasn't thinking these things up."

The only surveillance project that was initiated by the two men was the investigation into the background of Mr. Biaggi, their former colleague on the New York police force, the official said, although that effort also received White House sanction.

Mr. Biaggi's sharp attacks on the Presidential crime message began in early May, 1969. In one news conference, Mr. Biaggi said that he had been troubled by Mr. Nixon's message in which he sought "out Italian-Americans for undeserved notoriety while there are organizations in existence who openly exhort violence and whose acts border on treason"—an apparent reference to radical antiwar groups.

5 Other Inquiries

The source said that Mr. Caulfield and Mr. Ulasewicz both suspected that Mr. Biaggi had some connections to organized crime, a suspicion they apparently could not confirm with their clandestine research.

The two men have been publicly linked to at least five other undercover investigations in 1969 and 1970 with obvious political overtones.

These included research into the Chappaquiddick incident involving Senator Edward M. Kennedy, Democrat of Massachusetts, in 1969; a potentially embarrassing report involving Representative Carl Albert, Democrat of Oklahoma, the House Speaker, possible financial links between Senator Edmund S. Muskie, Democrat of Maine, and some corporations with pollution problems; the funding of Senator Hubert H. Humphrey's 1968 campaign for the Presidency, and rumors that the brother of a leading Democrat might have been involved in a homosexual incident.

In addition, Mr. Caulfield and Mr. Ulasewicz also reportedly investigated the alleged harassment of Mrs. David Eisenhower by a Florida school teacher. Mrs. Eisenhower is President Nixon's younger daughter, Julie.

Mr. Ulasewicz is now living in Hadley, N. Y. Mr. Caulfield was dismissed last month from his post as assistant director of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms.

Halperin at Brookings

In late 1969, Morton H. Halperin, then a member of the council staff, resigned and became associated with Brookings, a relationship he still maintains. Mr. Halperin has also been associated with Dr. Daniel Ellsberg, whose Federal trial on charges stemming from his copying and releasing of the Pentagon papers recently ended when the judge dismissed the case because of the misconduct of the Government. The papers were classified Government documents about the origins of the Vietnam war.

(1a)

NOTICE OF MOTION FOR DISCLOSURE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-against-	:	NOTICE OF MOTION
RICHARD HUSS and JEFFREY SMILOW,	:	
Defendants.	:	

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavits of Paul G. Chevigny, sworn to the 2nd day of November, 1973, of Richard Huss, sworn to the 31st day of October 1973 and of Jeffrey Smilow, sworn to the 1st day of November, 1973, the charges and all the proceedings heretofore had herein and in the cause of United States v. Cohen and Davis, 72 Cr. 778, the undersigned will move this Court at a motion term thereof to be held before the Hon. Thomas P. Griesa, U.S.D.J. at a time and place to be set by the Court, at the United States Courthouse, Foley Square, New York, New York, pursuant to the Federal Rules of Criminal Procedure, Rule 16, the First, Fourth, Fifth and Sixth Amendments to the United States Constitution, and Title 18, U.S.C. Sections 2510-20 and 3504 for an order compelling the

United States to disclose to defendants:

(1) Any and all actual voice records, tapes, mechanical or electronic recordings, and any and all logs, records, memoranda, letters and airtels, of any wiretapping, bugging, electronic or other similar surveillance,

(a) of any wire or oral communications to which the defendants were parties;

(b) of any wire or oral communications at the premises of the defendants;

(c) of any wire or oral communications at any place in which the defendants had an "interest" at the time of the surveillance; "interest" meaning any property right in the place or any other nexus of use, access, political association and reasonable expectation of privacy;*

(d) of any wire or oral communications placed under surveillance for the purpose, in whole or in part, in gathering evidence or leads against the defendants,

(e) of any wire or oral communications of members of the Jewish Defense League;

(f) of any wire or oral communications at any place

*Defendants have annexed hereto as Exhibit A a list of addresses and telephone numbers at which they and the other persons referred to in paragraph (2) have had an expectation of privacy in communications in order to aid the Government in searching for the materials sought by this motion. The list is not to be considered exhaustive of such places since it is the responsibility of the Government to make the necessary investigation.

at which the defendants were present at the time of the surveillance;

(g) of any wire or oral communications in which any party to same is unidentified;

(h) of any wire or oral communications in which the defendants are named or otherwise referred to.

(2) Any and all actual voice records, etc. and any and all logs, etc. of any wiretapping, bugging, electronic or other similar surveillance of any wire or oral communications:

(a) to which any attorney for the defendants, his agents or employees was a party;

(b) to which co-counsel of defendants' attorneys, and their agents and employees were party;

(c) any conversation at which any such persons were present; and

(d) at the homes or offices of any such person.

(3) Any and all logs, records, memoranda, letters, and airtels of any surveillance of wire or oral communication such as are described in (1) and (2) supra, which surveillance revealed the existence of said conversation but not necessarily the contents.

(4) The demands for disclosure (1)-(3), supra, embrace surveillance undertaken not only by the United States, its agents and employees, but by any governmental agency--state or local--and by any private person or corporation; and further embrace any

surveillance of wire or oral communication to which a party to that communication allegedly "consented".

(5) For any surveillance as described in (1)-(4), supra, for which there are no logs, memoranda, letters, records, or air-tels, the names and business addresses of the persons who conducted said surveillance or who have knowledge of said surveillance.

(6) For any surveillance requested (1)-(5), supra, which this Court might deny the demand for the logs, memoranda, records or airtels of same, the existence and circumstances of same; "circumstances" is meant to include date and place of the surveillance, who was present at said place, who conducted said surveillance, the manner in which it was conducted and all other relevant facts.

(7) The demands made supra seek not only disclosure of surveillance presently known to the government but that which in the exercise of due diligence may become known thereto.

(8) Defendants further demand all applications, affidavits, memoranda and other papers submitted in support of applications for executive, administrative or judicial approval of such surveillance as described supra (paragraphs (1)-(7) and all administrative, judicial and executive orders, opinions and decisions responsive thereto or relating to items (1)-(7).

(9) Defendants further demand disclosure of whether

and to what extent representatives of the White House Staff, including the so-called Intelligence Evaluation Committee and its staff, comprised of representatives of the White House, CIA, FBI, NSA, Departments of Justice, Treasury and Defense Departments, and the Secret Service, or any other Federal, State or local government agencies, participated in any activities with respect to the preparation or investigation of the subject matter of this case which activities were unauthorized by any court, consisting of burglary, acts of sabotage, mail searches, electronic surveillance devices, provacateurism, breaking and entering, or any and all other espionage tactics used against the Defendants herein, or in the preparation of the indictment herein.

(10) Whether and to what extent employees or agents of the White House, including the above-named Intelligence Evaluation Committee, its members and representatives described above, and/or the so-called White House Special Investigation Unit designated as the "Plumbers" and any other agencies of government or private persons acting on behalf of agencies of government participated in any or all of the espionage activities described above against these defendants, the Jewish Defense League and members of it, and/or the attorneys for defendants and for the Jewish Defense League and for other members of the Jewish Defense League.

(11) Whether and to what extent files which may have affected the Defendants or the prosecution herein have been lost

or destroyed.

(12) Defendants further request disclosure of all airtels, letters, records, memoranda or other written material which incorporates or makes reference to, either explicitly or implicitly, the product of any surveillance as described (1) through (11), supra, or makes reference, either explicitly or implicitly, to any surveillance as described (1) through (11), supra.

(13) Defendants further respectfully move this Court for an Order of continuing disclosure of the items sought supra under Federal Rule of Criminal Procedure 16(g) and any applicable local rule or rules.

(14) Defendants further request an evidentiary hearing prior to trial to determine:

(a) whether the government has fully complied with the demands made, supra (said hearing is requested for the earliest possible date);

(b) the standing of the defendants to raise the issue of the legality of any said surveillance;

(c) the legality of any said surveillance;

(d) the extent to which said surveillance resulted in the discovery of defendants as witnesses in the case of United States v. Cohen and Davis and tainted the evidence that would have formed the basis of examination of defendants by the government at the trials of Cohen and Davis.

(e) The purpose of such surveillance.

(15) Defendants further move that, in the event said hearing should disclose that their identities as witnesses in United States v. Cohen and Davis were discovered as a result of illegal surveillance or that the evidence on which they were to be questioned in that case was tainted by illegal surveillance, that the charge herein of criminal contempt against defendants be dismissed.

The grounds for this motion, as more particularly set forth in the accompanying affidavit and memorandum of law are that only through effective pre-trial adversary inquiry can the defendant be protected in his right to be free of the effects of unlawful wiretapping, bugging electronic and other similar surveillance, and all other illegal actions by the government.

(16) Defendants further request that this Court issue a protective order directing that the nature and contents of the aforesiad requested materials:

(1) may be disseminated only to counsel of record for defendant; and

(2) may not be disclosed except with the express written permission of said defendant to any other person, natural or artificial, public or private, whatsoever.

(17) Defendants further request such other and further relief as seems just and proper to this court.

(108)

Yours, etc.,

Dated: November 2, 1973

Eve Cary

PAUL G. CHEVIGNY
EVE CARY
Attorneys for Defendants
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

TO: PAUL J. CURRAN
United States Attorney
Federal Courthouse
Foley Square
New York, N.Y. 10007

(109)

PAUL G. CHEVIGNY, being duly sworn, deposes and says:

1. I am an attorney admitted to the Bar of this Court, with offices at 84 Fifth Avenue, New York, New York, and I am one of the attorneys for the defendants herein. I make this affidavit in support of the defendants' motion for disclosure and to suppress and dismiss the charges.

2. Some of the previous history of the surveillance in this case, as disclosed at earlier hearings, is set forth in the opinion of the Court of Appeals in United States v. Huss, 482 F.2d 38 (2nd Cir 1973). In approximate chronological order, drawn from the opinion, the events are as follows:

Date	Description
October, 1970	Commencement of unlawful wiretap of Jewish Defense League (JDL) office telephone;
April 22, 1971	Amtorg bombing;
June 3, 1971	Physical surveillance of Sheldon Siegel begins;
June 29, 1971	S. Siegel indicted, N.Y. Sup. Ct. for possession of explosives;
July 2, 1971	End of unlawful tap of JDL office telephone;
August 9, 1971	S. Siegel agrees to become informer;
September 8, 1971	Indictment in Amtorg bombing EDNY. S. Siegel is indicted, but continues as informer;
September, 1971	S. Siegel is promised immunity;
December 15, 1971	Commencement of unlawful wiretap of S. Siegel home telephone;
January 26, 1972	Smoke bomb in offices of S. Hurok (subject of trial underlying this case);
March 1, 1972	End of unlawful wiretap of S. Siegel home telephone.

There are on information and belief no examples of lawful electronic surveillance. This apparent patchwork of wiretapping and police investigation, punctuated by acts of violence, suggests a number of questions. Defendants assert that the sequence of facts, together with the conclusions drawn by the Circuit Court, and recent developments in the law demonstrate:

(a) Defendants have standing to assert a privilege for unlawful surveillance of the Jewish Defense League because it was directed against them, whether or not they were parties to conversations;

(b) Defendants have standing to assert a privilege for unlawful surveillance of Sheldon Siegel, because it was directed against them;

(c) It is likely that there are surveillances not yet revealed in previous proceedings, as to which defendants have standing, including surveillance of the JDL and its members.

A. Standing Of Defendants For Surveillance Of Siegel

3. The admission by the government of a tap on Sheldon Siegel's telephone from December, 1971 to March, 1972, long after Siegel was made into an informer and had even been promised immunity, suggests one thing very clearly: the tap was not primarily directed against Sheldon Siegel. The government was hoping to hear Siegel's conversation with other members of the JDL, and thereby obtain evidence against them, or those they mentioned. Even if it is assumed that the tap was a check on Siegel's veracity it is still true that it was directed against

persons other than Siegel, members of JDL expected to call in and presumably make statements which would verify or contradict his information. It is significant that apart from the JDL wiretap which ended before the Amtorg bombing governmental officials established and admitted to an unlawful wiretap only of an informer, who was an integral member of a tightly organized political group, other members of which were suspected or accused of conspiratorial crimes with the informer. Officials did not admit to taps on other members, who were not informers. The reason? The authorities believed that the other members of the organization would not have standing to assert the invasion of Siegel's privacy, and Siegel would have no reason to assert it.* The point here is that the surveillance was directed at persons other than the informer whose telephone was tapped - persons in the same organization who might be identified as callers, or through conversations. It is for this reason that defendants urge the court to determine the purpose of the wiretaps. If there is dispute about the purpose, an evidentiary hearing should be held.

*It is true that Sheldon Siegel did have occasion to assert his standing when he became a prospective witness in the Hurok case, but at the time the surveillance was begun (December, 1971), several factors excluded that from official consideration: (a) the government presumably in December, 1971, had no reason to suppose that there ever would be a "Hurok" case, in January, 1972; (b) the right of a witness to assert his privilege was not generally recognized before Gelbard v. United States, 408 U.S. 41 (June 26, 1972).

B. Likelihood Of Further Surveillance

4. Defendants do not mean to assert by the foregoing paragraphs that they accept the representations made in earlier proceedings that the only unlawful surveillance was that on the JDL telephone up through March, 1971, and the tap on Siegel's telephone in the winter of 1971-72. We do mean to assert that those taps are admitted to just because they either do not seem on the surface to help the defendants, or because some officials believed that the defendants would not have standing to challenge them. We reiterate that it is improbable that there were no taps on JDL telephones, once the Amtorg bombing had occurred. Amtorg, on information and belief was a Russian trading agency. As late as January 23, 1973, then Attorney General Kleindienst asserted in an affidavit filed in United States v. Stuart Cohen et al (the Hurok case), that the surveillance was a matter of foreign security, and therefore exempt from the strictures of United States v. United States District Court, 407 U.S. 297 (June 19, 1972). The same assertion was made as late as 1973 by the government in the civil action in the District of Columbia based on the same JDL tap (October, 1970 - March, 1971). Zweibon et al v. Mitchell 71 Civ. 2025 (DDC). If foreign security was the purpose of taps on JDL offices and/or members, and it was thought to be exempt from the warrant requirement, there would seem to have been an a fortiori case after the Amtorg bombing.

5. The tap on the JDL office telephone was instituted in October, 1970. If the authorities were willing to undertake

such unlawful surveillance, it strains credulity to imagine that all such sources were suddenly ended in the middle of the Amtorg investigation, and before any informer was found.

6. One extraordinary fact, not emphasized by the Court of Appeals, is that Det. Santo Parola, Sheldon Siegel's handler, was heard on Sheldon Siegel's own tapes of conversations, speaking of the source of information, saying, "It's done on wiretaps" (482 F.2d at 49). Det Parola used the plural instead of "It's done on a wiretap" This may of course be mere loose phraseology, but it clearly suggests more than one wiretap. A second point is that the logs submitted by the government apparently disclosed nothing which would have led to Siegel either as a suspect or an informer. Nevertheless, the Court of Appeals assumed, in order to reach its decision reversing the conviction of Siegel, that there was such information, or at least that the implication raised by the words of Det. Parola that there was such information was not rebutted. That implication remains open; we have not yet seen a tape or a log which would have produced such information.

7. It is just as difficult to believe that there were no electronic surveillances (even with a warrant) on any offices or members of the JDL after the Hurok bombing, apart from the

wiretap on Sheldon Siegel's home telephone. Unless in fact that wiretap revealed everything the government needed to know, and it apparently did not, there was every reason to look elsewhere than to Siegel alone for information.

8. Recent history has shown that circumstances make it extremely difficult for the government to make an unassailable assertion that there is no unlawful surveillance, or that records found of such surveillance are in fact complete. The reports now contain a number of cases in which surveillance has been found after assertions that there has been none. One of the leading cases concerns a previous stage in this litigation. United States v. Smilow, 409 U.S. 944 (1972); 472 F.2d 1193 (2nd Cir. 1972). There it appeared, at the Supreme Court level, that the government actually may have had some surveillance of Mr. Smilow, previously undetected because it was under the name "Jeff". This case and other cases, cited in the accompanying memorandum of law, reveal that the government is not always able to retrieve records of all its surveillance, for a number of reasons. These may be simply summarized as follows:

(a) Government listeners often do not know the names of callers. The events in the previous Smilow case arose in this way. This means that a call may come into a line which is illegally tapped, or words be spoken that are bugged, and may yield information, but it may not be easily traceable to the person who made it.

(b) The government does not know which logs or tapes of surveillance to canvass. Unexpected persons may call in on lines which are tapped in connection with entirely separate matters. This is especially important in connection with calls to and from attorneys.

(c) Sources are difficult to trace because records are often kept solely by the name of the person who owns the telephone, and not by the names of callers.

(d) Central record-keeping about wiretaps, especially illegal ones, is very sketchy. Facts are concealed as between agencies, and even within agencies.

(e) Personnel sometimes do not know the source of items in a file, especially if they are unlawfully obtained.

(f) Material revealed in tapes or airtels is sometimes not included in logs.

Accounts of difficulties encountered by attorneys in attempting to make a final determination of taint are set forth in copies of affidavits of Michael Tigar, Esq., dated April 11, 1971, in the record in the case of United States v. Ahmad, M.D. Pa. Index #14886, and of William Bender, Esq., dated March 5, 1973, in the case of United States v. William Ayers, E.D. Mich. Index #48104. Copies are attached hereto.

9. The revelations of the Watergate investigations

have raised still other problems of surveillance. On June 7, 1973, the New York Times printed the text of a plan for intelligence-gathering. (See attached) It is not only related to internal but to so-called foreign security. The text states, in part, under B:

ELECTRONIC SURVEILLANCE AND PENETRATIONS. RECOMMENDATION:

"Present procedures should be changed to permit intensification of coverage of individuals and groups in the United States who pose a major threat to the internal security.

Also, present procedures should be changed to permit intensification of coverage of foreign nationals and diplomatic establishments in the United States of interest to the intelligence community.

It appears, forthermore, that despite protestations to the contrary, part or all of the plan was put into effect. Sen. Lowell Weicker charged that part of it was used, see New York Times June 11, 1973 (attached) The plan itself being applicable to problems of "foreign" as well as domestic security, and the JDL presenting serious problems in relation to both areas, the plan was fully as applicable to the JDL as to other organizations.

10. The Watergate revelations make it more clear than ever that a government agency cannot rely on the bland assurances of others concerning the existence of unlawful surveillance. Thus an article in Newsweek for June 11, 1973, summarizes some of

the conclusions. It appears that the plan of the Interagency Committee on Intelligence was put into operation, despite disclaimers. More important, certain wiretaps not known to other persons in government were kept secret. Similarly, The New York Times for July 10, 1973 reports that material related to the "plumbers" group was concealed even from FBI agents by high government officials. Again, the New York Times for June 6 reported other "untraceable" wiretaps attributed to John D. Ehrlichman (see attached).

11. These issues are relevant to surveillance problems of the JDL, for several reasons which appear on the surface of the facts in the case:

(a) Information concerning the unlawful wiretaps emanated from the Internal Security Division of the Justice Department, which was one center also of the work of the Interagency Committee on Intelligence.

(b) The wiretap of Sheldon Siegel's telephone was approved at a high level and in such a specialized manner that it is possible for other surveillance to have been approved via similar "non-routine" manner, making detection very difficult.

(c) The government itself turned up references to Jeffry Smilow in an earlier case when it had not previously been able to find them.

12. The problems of proof raised in the foregoing paragraphs are not applicable solely to"left-wing" organizations, in some manner which would exclude the JDL. In the first place, as previously noted, there was admitted unlawful governmental activity against the JDL. Moreover, clandestine activities were conducted by the government with relation to right-wing organizations for many reasons. The New York Times for June 24, 1973, records one such infiltration. (see attached). It is now well-known that Sheldon Siegel was a government informer at the time his home telephone was unlawfully tapped, and before and after that time. It is apparent that the admitted tap was used as an avenue to other members of the organization.

C. Standing of Defendants With Relation To Existing and/or Undetected Surveillance

13. The attached affidavits of Jeffrey Smilow and Richard Huss detail their relationships with the JDL, Sheldon Siegel, and other members of the organization. On information and belief, these will show the associational interest in all information obtained by the government. This is peculiarly a case in which the interests of the defendants, JDL and Sheldon Siegel cannot be compartmentalized. The interests of defendants

in all such surveillance should be recognized by this court.

Paul G. Chevigny

PAUL C. CHEVIGNY

Sworn to before me this

2nd day of November, 1973

Ete Czay

NOTARY PUBLIC

Notary Public, State of New York

Qualified in [illegible]

Commission Expires [illegible], 197[illegible]

STATE OF NEW YORK
ss.:
COUNTY OF NEW YORK

RICHARD HUSS, being duly sworn, deposes and says:

1. I reside at 5 Staten Island Blvd., Staten Island, New York.

2. I have been a member of the Jewish Defense League since November, 1970.

3. The purpose of the Jewish Defense League is to help Jews. It does this in a number of different ways. We seek to put pressure on the American government to use its influence on other governments to cease anti-Semitic policies and persecution of Jews. We do this through demonstrations, picketing, rallies, sit-ins etc. We also have organized poverty programs for Jews and have attempted to see that existing programs met the needs of poor Jews. We have been involved on school boards and election campaigns. We have had an excellent education program including Jewish history, physical education and Hebrew language classes. We have sought to affirm our Jewish identity and instill pride in Jews of their religious and cultural heritage.

4. The JDL is divided into two parts: the adult movement and the youth movement. I was a member of the youth movement which consisted of members under the age of 25 and members who were still in school. Adult members were in charge of raising money and making policy, while the youth movement members carried

out most of the organizations activites.

5. During my first year of membership I occasionaly visited and telephoned JDL headquarters in Manhattan. Most of my work was done in Staten Island where I was an active member. I went to many demonstrations during this period. In the fall of 1971 I was appointed Staten Island coordinator for the JDL. In this capacity I tried to increase membership in the organization and sometimes gave talks about the JDL to temple groups. I also attended weekly administrative board meetings of all of the New York area co-ordinators and other JDL officials such as director of publicity, director of activities etc. to report on my work. I worked approximately 10 hours per week on JDL activites. In approximately Mrach of 1972 I was chosen to be director of activities of the JDL. At that point I was given my own office at JDL headquarters where I worked from three to four hours each weekday and a full day on Sundays. I occasionally spent nights in the JDL office. I was sometimes alone in the office or with only one other person.

6. Much of my work at all times consisted of telephoning. Often we would have to telephone the entire JDL membership which we did instead of writing to them to inform them of an activity to take place immediately. In the Brooklyn headquarters at 4002 New Utrech Avenue there were three telephones

for youth movement workers, two for receptionists, and approximately four for the adult movement. We all used all of the telephones. No one had a private line. I only called out on Brooklyn headquarters telephones, but I did telephone to the New York headquarters when they were in Manhattan.

7. My lawyers in connection with this matter have been Bertram Zweibon, Arthur Miller and Robert Persky. I have talked to all of them on the telephone. I have been to Mr. Zweibon's office.

8. At different times I have telephoned every member of the JDL who belonged to the organization at the same time I was. I am searching now for additional telephone numbers that I called and will submit them when my list is complete.

RICHARD HUSS

Sworn to before me this
1st day of November, 1973

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
vs.	:	Indictment No. 48104
WILLIAM AYERS, et al.,	:	
Defendants.	:	
	:	

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE, FOR A PRE-TRIAL HEARING TO SUPPRESS EVIDENCE, AND TO DISMISS THE INDICTMENT.

State of New Jersey:
ss.
County of Essex. :

William J. Bender, being duly sworn, deposes and says:

1. I am making this affidavit in support of the defendants' motion to disclose electronic surveillance, and to inform the Court of certain facts which demonstrate the need for an evidentiary hearing on said motion.

2. In my experience as a defense counsel in United States v. Ahmad, M.D.Pa., No. 14,950, a case involving illegal governmental electronic surveillance, I have become familiar with techniques of the F.B.I. in conducting such surveillance, and with the problems of attempting to discover the extent of surveillance of a given defendant, the extent of surveillance used to investigate the case, and of devising an adequate court procedure to ascertain whether the government has fully complied with its legal duty to disclose all illegal taps to which a defendant has standing to object.

3. The government in Ahmad, "admitted to what ... [it] believe[d] are probably conversations of Sister Elizabeth McAlister, one of the defendants in this case," said conversations having been overheard in a "national security" electronic surveillance authorized by the Attorney General of the United States. (Hearing of May 24, 1971, pp 56-57). The government steadfastly maintained from the outset that the overhearing of Sister McAlister was inadvertant, having nothing to do with furthering the prosecution of its case and having no relationship to trial evidence. (Id. 78). The government also adamently asserted in the early stages of this case that the logs of the two alleged McAlister conversations were all that the defendants were entitled to or that existed. The government unequivocally informed the court that it had "searched the investigative agencies of the federal government" (Id. 58); "searched our files" as "to any surveillance to our knowledge conducted by state or local law enforcement agencies or private persons," (Id. 66), and as to those places wherein the defendants claimed on expectation of privacy in their moving papers "[i]f those people had an expectation of privacy in those premises and if they have ever made a phone call from those places, and if the surveillance which the defendants allege occurred did occur, then the records of the Department of Justice we searched would have disclosed that fact. They have not." (Id. 86A).

4. The government, however, consistently attempted to retain for itself the disposition of the question of whether the defendants had standing to compel disclosure of electronic surveillance that may have occurred at places wherein defendants asserted an expectation of privacy, as set forth in their moving papers (Id. 58, 59). The Deputy Assistant Attorney General claimed, "that the interest of ... [the] court and the interest of justice do not require us to go through an extensive search of our records on the basis of a totally unsupported claim of an expectation of privacy." (Id. 64).

5. In a post-trial "taint" hearing, the government, in response to defendants' renewed motion for full disclosure of electronic surveillance, again unequivocally denied any additional electronic surveillance to which the convicted defendants had standing to object. (See Hearing of May 1, 1972, pp. 70-73). After turning over the logs of the two alleged conversations of Sister McAlister, the government produced Agent Mason Smith of the Philadelphia F.B.I. office and Agent Gary Watt of the Washington, D.C. F.B.I. office to testify at the taint hearing.

6. The government's earlier representations, that whatever illegal electronic surveillance (of the so called

"national security" variety) it may have conducted was only for intelligence data gathering, were promptly contradicted. F.B.I. Agent Smith, who initiated the request for the surveillance in question (Hearing of May 2, 1972, partial transcript p. 31), and then supervised the surveillance operation (Id. 36), testified in direct opposition to the prior representations of the government attorneys; the surveillance was conducted to gather evidence to further the prosecution in this case (Id. 24, 45, 47) See ¶ 3, supra).

7. The government's representations, that it has made a bona fide exhaustive effort in searching its wiretap logs to ensure full disclosure of all illegal wiretaps for which defendants have standing, should not be accepted by this Court; in view of the inadequacy of the government's prior record of inadequate searching techniques, a full hearing on the sufficiency of the search is necessary. The determination of the participation of Sister McAlister on the calls was surmised by the government by reference to the telephone numbers that were called by the subject of the surveillance, (Id. 12), namely the number of the convent where Sister McAlister then resided along with other nuns. However, no effort was made to identify the voice of any person calling into the tapped location during the course of the surveillance or afterward. (Id. 14). Unless a full name was mentioned in the course of a tapped conversation, the only means of identification was by way of the name of the phone service subscriber to whom the intercepted call was made (Id. 14). Agent Smith admitted that often in phone conversations, a full name is not used,

as was the case with the two logs before the court, where only a first name, to wit, "LIz" was used. (Id. 15). The agent also recognized the possibility that names are not always used (Id. 18), making identification by names impossible. The mechanical devices which recorded the phone numbers of outgoing calls from the tapped location could not register the phone numbers of incoming calls, so incoming calls could not be similarly identified (Id. 33). The only way that Sister McAlister or anyone else calling into the tapped location could be identified, would be by the use of a name. (Id. 33). Smith could not answer with certainty whether there were any calls which could not or had not been identified. (Id. 33-34). Because the two logs were not positively identified as containing Sister McAlister's voice, no formal record of her conversations having been overheard was made. (Id. 37). The agent's testimony as to his indices check for other possible overheard conversations indicated his inability to identify persons calling the tapped location who may have failed to give their full name (Id. 50).

8. The inadequacy of the government's central record-keeping system of wiretap logs further underscores the need for a full hearing on the sufficiency of the government's search for and disclosure of illegal wiretaps. Agent Watt, a supervisor of the F.B.I.'s domestic intelligence division, supervised the general search of records (Id. 54), pursuant to a letter from the Justice Department attorneys (Id. 57), in order to disclose any electronic surveillance as to

defendants, their attorneys, or any unindicted coconspirators. The means for ascertaining the existence of surveillance is an F.B.I. index comprised of an alphabetical list of names (Id. 57). Index cards would indicate that a telephone belonging to the person listed, was tapped, that someone was overheard who called into the installation, "the date the installation was installed might be also included in the file, and the location ... possibly." (Id. 58). Unidentified callers who may only use first names who call into a tapped installation would not be reflected in the index (Id. 59). Agent Watt was not certain if the fact of the existence of unidentified callers on the tap would be listed in some manner. No index is kept by investigating subject, by name of case, or by place. The only way to determine whether someone has been overheard is to search for a name alphabetically in an index file (Id. 61). Watt knew of no other method within the department of determining whether or not a particular individual has been overheard (Id. 61-62). The only way to determine if a residence had been overheard would be if the residence was identified with a name in the index. (Id. 65). The defendants' submission to the government of a list of places, wherein they had an expectation of privacy, to assist the government in searching its files, was a worthless exercise because, "if his name wasn't mentioned, his name wouldn't be included in the indexes [sic]." (Id. 67). Contrary to the earlier representations of the government attorneys (See Point

III, supra.), Agent Watt testified that only the F.B.I. index was checked and other investigatory agencies of the federal government were not. (Id. 73-74). Where several people shared a residence with a tapped phone, only the name of the telephone subscriber would appear on the index, not the other users of the phone. No search was made for an item "Religious Sacred Heart of Mary," the residence of Sister McAlister, one of the places listed in defendants' motion. (Id. 77).

9. Because of the past history of F.B.I. Agents evidencing a marked reluctance to cooperate in the facilitation of a meaningful taint hearing, this Court must redouble its efforts to ensure a full hearing on all relevant matters pertaining to the sufficiency of the government's efforts of disclosure. The testimony of Agents Smith and Watt, and of Special Agent Charles Dunham and Special Agent Supervisor William Anderson in the subsequent hearing of May 15, 1972, included generally vague and illusive answers and a noteworthy inability to recall essential details of the investigatory processes underlying the case.

10. Agent Smith testified that, "[t]here would be nothing to prevent [Agent Durham] (the case agent] ... from looking at ... this surveillance material." Durham headed the investigation of the case. (Hearing of May 2, 1972, pp.35-36). Smith did not know who may have received the tapes or who would know if they were seen at all. (Id. 40,48). No record

was kept as to who received the logs or who heard the tapes (Id. 37-38).

11. Agent Watt was "not absolutely certain" that he did not furnish information from electronic surveillance files during the investigation (Id. 80). Watt did not check his files prior to testifying to determine whether evidentiary leads had been sent out (Id. 81).

12. Agent Durham, who worked on the case investigation, reported to Anderson who in turn reported to Agent Jamison, the Special Agent in charge (hearing of May 15, 1972, p. 22). Durham, as "case agent" was "to correlate, assemble, possibly send out leads, investigate leads and then prepare reports in this matter." (Id. 25). Anderson saw the reports before they were sent to the Justice Department (Id. 25). The overall case file included a subfile designated "June File" which was understood by Durham to be "the sub-section wherein all matters pertaining to this hearing would have been routed." (Id. 33). Durham did not know where the particular "June File" was kept (Id. 35). He did know that the file had been opened and assigned to Smith (Id. 37) and perhaps Smith may have seen it (Id. 36). In twenty years of experience as an F.B.I. agent, this was Durham's only contact with a "June File" (Id. 37). He saw "a few communications that were very early, at its inception, placed in that file," (Id. 38) but he did not remember what they were except they concerned the authorization for the surveillance (Id. 39). Durham's function was to receive all matters coming into the file and to control

the filing and the sending out of leads (Id. 39-41). He knew who the subject matter of the surveillance was (Id. 46). He was to send leads from Philadelphia to New York during the course of the surveillance operation (Id. 60). He could not recall how many leads he sent to New York, but he did recall performing this function (Id. 60). He thought he could reconstruct which leads were sent out and whether they were sent after the surveillance had ended, but he did not check his files in preparation for the hearing or bring them to court (Id. 61, 62, 65, 78).

12. Both Smith and Durham reported to Agent Anderson who had overall responsibility for maintaining the files of the investigation (Id. 84). Anderson knew of the existence of the "June File" which contained secret electronic surveillance information with regard to the investigation. (Id.88-89). He received Durham's investigatory reports and none showed the wiretap as a source for the information contained in the reports (Id. 106-107). He did not review these reports prior to his court appearance (Id. 106). The investigatory reports are several thousand pages long (Id. 107). Although he thought he could determine with certainty whether or not leads had been developed from the surveillance, he had not done so, by searching files in preparation for the hearing (Id. 113).

13. The record in United States v. Ahamad exemplifies the government's past history of insufficient disclosure of its surveillance activities and the reoccurring absence of meaningful disclaimers of additional unlawful surveillance activity. A search of Justice Department files, without an oral hearing to determine the extent of surveillance will not

(132)

ensure any defendant in the instant case that his or her rights under Alderman v. United States are being protected. If the ensuing taint hearing is to be meaningful, the detailed exposure of the government's investigatory process, lacking

THE NEW YORK TIMES, THURSDAY, JUNE 7, 1973

Texts of Documents Relating to Domestic Intelligence-Gathering Plan in 1970

Special to The New York Times

WASHINGTON, June 6—The following are the texts of recommendations for increased domestic intelligence gathering made to President Nixon in July, 1970, by an interagency Government committee; an analysis of the committee's report and of strategy to be used to secure the cooperation of J. Edgar Hoover; and a "decision memorandum" reflecting President Nixon's approval of the committee's recommendations. The President later rescinded his approval after the plan was opposed by Mr. Hoover.

Recommendations

TOP SECRET

Handle via Comint Channels Only

Operational Restraints on Intelligence Collection

A. Interpretative Restraints on Communications Intelligence

RECOMMENDATION:

Present interpretation should be broadened to permit and program for coverage by N.S.A. [National Security Agency] of the communications of U.S. citizens using international facilities.

RATIONALE:

The F.B.I. does not have the capability to monitor international communications. N.S.A. is currently doing so on a restricted basis, and the information is particularly useful to the White House and it would be to our disadvantage to allow the F.B.I. to determine what N.S.A. should do in this area without regard to our own requirements. No appreciable risk is involved in this course of action.

B. Electronic Surveillance and Penetrations.

RECOMMENDATION:

Present procedures should be changed to permit intensification of coverage of individuals and groups in the United States who pose a major threat to the internal security.

Also, present procedures should be changed to permit intensification of coverage of foreign nationals and diplomatic establishments in the United States of interest to the intelligence community.

At the present time, less than [unclear] electronic penetrations are operative. This includes coverage of the C.P.U.S.A. [Communist Party, U.S.A.] and organized crime targets, with only a few authorized against subject of pressing internal security interest.

Mr. Hoover's statement that the F.B.I. would not oppose other agencies seeking approval for the operating electronic surveillances is gratuitous since no other agencies have the capability.

Everyone knowledgeable in the field, with the exception of Mr. Hoover, concurs that existing coverage is grossly inadequate. C.I.A. and N.S.A. note that this is particularly true of diplomatic establishments, and we have learned at the White House that it is also true of New Left groups.

C. Mail Coverage

RECOMMENDATION:

Restrictions on legal coverage should be removed.

Also, present restrictions on covert coverage should be relaxed on selected targets of priority foreign intelligence and internal security interest.

RATIONALE:

There is no valid argument against use of legal mail covers except Mr. Hoover's concern that the civil liberties people may become upset. This risk is surely an acceptable one and hardly serious enough to justify denying ourselves a valuable and legal intelligence tool.

Covert coverage is illegal and there are serious risks involved. However, the advantages to be derived from its use outweigh the risks. This technique is particularly valuable in identifying espionage agents and other contacts of foreign intelligence services.

D. Surreptitious Entry

RECOMMENDATION:

Present restrictions should be modified to permit procurement of vitally needed foreign cryptographic material.

Also, present restrictions should be modified to permit selective use of this technique against other urgent security targets.

RATIONALE:

Use of this technique is clearly illegal: it amounts to burglary. It is also highly risky and could result in great embarrassment if exposed. However, it is also the most fruitful tool and can produce the type of intelligence which cannot be obtained in any other fashion.

The F.B.I., in Mr. Hoover's younger days, used to conduct such operations with great success and with no exposure. The information secured was invaluable.

N.S.A. has a particular interest since it is possible by this technique to secure material with which N.S.A. can break foreign cryptographic codes. We spend millions of dollars attempting to break these codes by machine. One successful surreptitious entry can do the job successfully at no dollar cost.

Surreptitious entry of facilities occupied by subversive elements can turn up information about identities, methods of operation, and other invaluable investigative information which is not otherwise obtainable. This technique would be particularly helpful if used against the Weathermen and Black Panthers.

The deployment of the executive protector force has increased the risk of surreptitious entry of diplomatic establishments. However, it is the belief of all except Mr. Hoover that the technique can still be successfully used on a selective basis.

E. Development of Campus Sources

RECOMMENDATION:

Present restrictions should be relaxed to permit expanded coverage of violence-prone campus and student-related groups.

Also, C.I.A. coverage of American students (and others) traveling or living abroad should be increased.

RATIONALE:

The F.B.I. does not currently recruit any campus sources among individuals below 21 years of age. This dramatically reduces the pool from which sources may be drawn. Mr. Hoover is afraid of a young student surfacing in the press as an F.B.I. source, although the reaction in the past to such events has been minimal. After all, everyone assumes the F.B.I. has such sources.

The campus is the battleground of the revolutionary protest movement. It is impossible to gather effective intelligence about the movement unless we have campus sources. The risk of exposure is minimal, and where exposure occurs the adverse publicity is moderate and short-lived. It is a price we must be willing to pay for effective coverage of the campus scene. The intelligence community, with the exception of Mr. Hoover, feels strongly that it is imperative the [was unclear] increase the number of campus sources this fall in order to forestall widespread violence.

C.I.A. claims there are not existing restraints on its covarage of overseas activities of U.S. nationals. However, this coverage has been grossly inadequate since 1965 and an explicit directive to increase coverage is required.

F. Use of Military Undercover Agents

RECOMMENDATION:

Present restrictions should be retained.

RATIONALE:

The intelligence community is agreed that the risks of lifting these restraints are greater than the value of any possible intelligence which would be acquired by doing so.

Budget and Manpower Restrictions

RECOMMENDATION:

Each agency should submit a detailed estimate as to projected manpower needs and other costs in the event the various investigative restraints herein are lifted.

RATIONALE:

In the event that the above recommendations are concurred in, it will be necessary to modify existing budgets to provide the money and manpower necessary for their implementation. The intelligence community has been badly hit in the budget squeeze. (I suspect the foreign intelligence operations are in the same shape) and it maybe will be necessary to make some modifications. The projected figures should be reasonable, but will be subject to individual review if this recommendatoin is accepted.

Measures to Improve Domestic Intelligence Operations

RECOMMENDATION:

A permanent committee consisting of the F.B.I., C.I.A., N.S.A. D.I.A. [Defense Intelligence Agency] and the military counterintelligence agencies should be appointed to provide evaluations of domestic intelligence estimates, and carry out the other objectives specified in the report.

RATIONALE:

The need for increased coordination, joint estimates, and responsiveness to the White House is obvious to the intelligence community. There are a number of operational problems which need to be worked out since Mr. Hoover is fearful of any mechanism which might jeop-

ardize his autonomy. C.I.A. would prefer an ad hoc committee to see how the system works, but other members believe that this would merely delay the establishment of effective coordination and joint operations. The value of lifting intelligence collection restraints is proportional to the availability of joint operations and evaluation, and the establishment of this interagency group is considered imperative.

Top Secret

Analysis and Strategy

Memorandum for: H. R. Haldeman

From: Tom Charles Huston

Subject: Domestic intelligence review

1. Background

A working group consisting of the top domestic intelligence officials of the FBI, CIA, DIA, NAS, and each of the military services met regularly throughout June to discuss the problems outlined by the President and to draft the attached report. The discussions were frank and the quality of work first-rate. Cooperation was excellent, and all were delighted that an opportunity was finally at hand to address themselves jointly to the serious internal security threat which exists.

I participated in all meetings, but restricted my involvement to keeping the committee on the target the President established. My impression that the report would be more accurate and the recommendations more helpful if the agencies were allowed wide latitude in expressing their opinions and working out arrangements which they felt met the President's requirements consistent with the resources and missions of the member agencies.

2. Mr. Hoover

I went into this exercise fearful that C.I.A. would refuse to cooperate. In fact, [illegible] (Director of Central Intelligence) was most cooperative and helpful, and the only stumbling block was Mr. Hoover. He attempted at the first meeting to divert the committee from operational problems and redirect its mandate to the preparation of another analysis of existing intelligence. I declined to acquiesce in this approach, and succeeded in getting the committee back on target.

When the working group completed its report, Mr. Hoover refused to go along with a single conclusion drawn or support a single recommendation made. His position was twofold:

(1) Current operations are perfectly satisfactory and (2) No one has any business commenting on procedures he has established for the collection of intelligence by the F.B.I. He attempted to modify the body of the report, but I successfully opposed it on the grounds that the report was the conclusion of all the agencies, not merely the F.B.I. Mr. Hoover then entered his objections as footnotes to the report. Cumulatively, his footnotes suggest that he is perfectly satisfied with current procedures and is opposed to any changes whatsoever. As you will note from the report, his objections are generally inconsistent and frivolous—most express concern about possible embarrassment to the intelligence community (i.e., Hoover) from public disclosure of clandestine operations.

Admiral Gayler and General Bennett were greatly displeased by Mr. Hoover's attitude and his insistence on footnoting objections. They wished to raise a formal protest and sign the report only with the understanding that they opposed the footnotes. I prevailed upon them not to do so since it would only aggravate Mr. Hoover and further complicate our efforts. They graciously agreed to go along with my suggestion in order to avoid a nasty scene and jeopardize the possibility of positive action resulting from the report. I assured them that their opinion would be brought to the attention of the President.

3. Threat Assessment

The first 23 pages of the report constitute an assessment of the existing internal security threat, our current intelligence coverage of this threat, and areas where our coverage is inadequate. All agencies concurred in this assessment, and it serves to explain the importance of expanded intelligence collection efforts.

4. Restraints on Intelligence Collection

Part Two of the report discusses specific operational restraints which currently restrict the capability of the intelligence community to collect the types of information necessary to deal effectively with the internal security threat. The report explains the nature of the restraints and sets out the arguments for and against modifying them. My concern was to afford the President the strongest arguments on both sides of the question so that he could make an informed decision as to the future course of action to be followed by the intelligence community.

I might point out that of all the individuals involved in the preparation and consideration of this report, only Mr. Hoover is satisfied with existing procedures.

Those individuals within the F.B.I. who have day-to-day responsibilities for domestic intelligence operations privately disagree with Mr. Hoover and believe that it is imperative that changes in operating procedures be initiated at once.

I am attaching to this memorandum my recommendations on the decision the President should make with regard to these operational restraints. Although the report sets forth the pros and cons on each issue, it may be helpful to add my specific recommendations and the reasons therefore in the event the President has some doubts on a specific course of action.

5. Improvement in Inter-Agency Coordination

All members of the committee and its working group, with the exception of Mr. Hoover, believe that it is imperative that a continuing mechanism be established to effectuate the coordination of domestic intelligence efforts and the evaluation of domestic intelligence data. In the past there has been no systematic effort to mobilize the full resources of the intelligence community in the internal security area and there has been no mechanism for preparing community-wide domestic intelligence estimates such as is done in the foreign intelligence area by the United States Intelligence Board. Domestic intelligence information coming into the White House has been fragmentary and unevaluated. We have not had, for example, a community-wide estimate of what we might expect short or long-term in the cities or on the campuses or within the military establishment.

Unlike most of the bureaucracy, the intelligence community welcomes direction and leadership from the White House. There appears to be agreement, with the exception of Mr. Hoover, that effective coordination within the community is possible only if there is direction from the White House. Moreover, the community is pleased that the White House is finally showing interest in their activities and an awareness of the threat which they so acutely recognize.

I believe that we will be making a major contribution to the security of the country if we can work out an arrangement which provides for institutionalized coordination within the intelligence community and effective leadership from the White House.

6. Implementation of the President's Decisions

If the President should decide to lift some of the current restrictions and if he should decide to authorize a formalized domestic intelligence struction, I would recommend the following steps:

(A) Mr. Hoover should be called in privately for a stroking session at which the President explains the decision he has made, thanks Mr. Hoover for his candid advice and past cooperation, and indicates he is counting on Edgar's cooperation in implementing the new decisions.

(B) Following this Hoover session, the same individuals who were present at the initial session in the Oval Office should be invited back to meet with the President. At that time, the President should thank them for the report, announce his decisions, indicate his desires for future activity, and present each with an autographed copy of the photo of the first meeting which Ollie took.

(C) An official memorandum setting forth the precise decisions of the President should be prepared so that there can be no misunderstanding. We should also incorporate a review procedure which will enable us to ensure that the decisions are fully implemented.

I hate to suggest a further imposition on the President's time, but think these steps will be necessary to pave over some of the obvious problems which may arise if the President decides, as I hope he will, to overrule Mr. Hoover's objections to many of the proposals made in this report. Having seen the President in action with Mr. Hoover, I am confident that he can handle this situation in such a way that we can get what we want without putting Edgar's nose out of joint. At the same time, we can capitalize on the goodwill the President has built up with the other principals and minimize the risk that they may feel they are being forced to take a back seat to Mr. Hoover.

7. Conclusion

I am delighted with the substance of this report and believe it is a first-rate job. I have great respect for the integrity, loyalty, and competence of the men who are operationally responsible for internal security matters and believe that we are on the threshold of an unexcelled opportunity to cope with a very serious problem in its germinal stages when we can avoid the necessity for harsh measures by acting swift, discreetly, and decisively to deflect the threat before it reaches alarming proportions.

I might add, in conclusion, that it is my personal opinion that Mr. Hoover will not hesitate to accede to any decision which the President makes, and the President should not, therefore, be reluctant to overrule Mr. Hoover's objections. Mr. Hoover is set in his ways and can be bull-headed as hell, but he is a loyal trooper. Twenty years ago he would never have raised the type of objections he has here, but he's getting old and worried about his legend. He makes life tough in this area, but not impossible—for he'll respond to direction by the President and that is all we need to set the domestic intelligence house in order.

TOP SECRET

Decision Memorandum

The White House

Washington

July 15, 1970

TOP SECRET

Handle via Comint Channels only

Subject: Domestic Intelligence

The President has carefully studied the special report of the Interagency Committee on Intelligence (ad hoc) and made the following decisions:

1. Interpretive Restraint on Communications Intelligence

National Security Council Intelligence Directive Number 6 (NSCID-6) is to be interpreted to permit N.S.A. to program for coverage the communications of U.S. citizens using international facilities.

2. Electronic Surveillances and Penetrations

The intelligence community is directed to intensify coverage of individuals and groups in the United States who pose a major threat to the internal security. Also, coverage of foreign nationals and diplomatic establishments in the United States of interest to the intelligence community is to be intensified.

3. Mail Coverage

Restrictions on legal coverage are to be removed, restrictions on covert coverage are to be relaxed to permit use of this technique on selected targets of priority foreign intelligence and internal security interest.

4. Surreptitious Entry

Restraints on the use of surreptitious entry are to be removed. The technique is to be used to permit procurement of vitally needed foreign cryptographic material and against other urgent and high priority internal security targets.

5. Development of Campus Sources

Coverage of violence-prone campus and student-related groups is to be increased. All restraints which limit this coverage are to be removed. Also, C.I.A. coverage of American students (and others) traveling or living abroad is to be increased.

6. Use of Military Undercover Agents

Present restrictions are to be retained.

7. Budget and Manpower

Each agency is to submit a detailed estimate as to projected manpower needs and other costs required to implement the above decisions.

8. Domestic Intelligence Operations

A committee consisting of the directors or other appropriate representatives appointed by the directors, of the F.B.I., C.I.A., N.S.A., D.I.A., and the military

counterintelligence agencies is to be constituted effective August 1, 1970, to provide evaluations of domestic intelligence, prepared periodic domestic intelligence estimates, carry out the other objectives specified in the report, and perform such other duties as the President shall, from time to time, assign. The director of the F.B.I. shall serve as chairman of the committee. Further details on the organization and operations of this committee are set forth in an attached memorandum.

The President has directed that each addressee submit a detailed report, due on September 1, 1970, on the steps taken to implement these decisions. Further such periodic reports will be requested as circumstances merit.

The President is aware that procedural problems may arise in the course of implementing these decisions. However, he is anxious that such problems be resolved with maximum speed and minimum misunderstanding. Any difficulties which may arise should be brought to my immediate attention in order that an appropriate solution may be found and the President's directives implemented in a manner consistent with his objectives.

Tom Charles Huston.

TOP SECRET
Handle via Comint Channels Only

Organization and Operations of the Interagency Group on Domestic Intelligence and Internal Security (IAG)

1. Membership

The membership shall consist of representatives of the F.B.I., C.I.A., D.I.A., N.S.A., and the counterintelligence agencies of the Departments of the Army, Navy, and Air Force. To insure the high level consideration of issues and problems which the President expects to be before the group, the directors of the respective agencies should serve personally. However, if necessary and appropriate, the director of a member agency may designate another individual to serve in his place.

2. Chairman

The director of the F.B.I. shall serve as chairman. He may designate another individual from his agency to serve as the FBI representative on the group.

3. Observers

The purpose of the group is to effectuate community-wide coordination and secure the benefits of community-wide analysis and estimating. When problems arise which involve areas of interest to agencies or departments not members of the group, they shall be invited, at the discretion of the group, to join the group as observers and participants in those discussions of interest to them. Such agencies and departments include the Departments of State (I & R, Passport); Treasury (I.R.S., Customs); Justice (B.N.D.D., Community Relations Service); and such other agencies which may have investigative or law enforcement responsibilities touching on domestic intelligence or internal security matters.

4. White House Liaison

The President has assigned to Tom Charles Huston staff responsibility for domestic intelligence and internal security affairs. He will participate in all activities of the group as the personal representative of the President.

5. Staffing

The group will establish such subcommittee or working groups as it deems appropriate. It will also determine and implement such staffing requirements as it may deem necessary to enable it to carry out its responsibilities, subject to the approval of the President.

6. Duties

The group will have the following duties:

(A) Define the specific requirements of member agencies of the intelligence community.

(B) Effect close, direct coordination between member agencies.

(C) Provide regular evaluations of domestic intelligence.

(D) Review policies governing operations in the field of domestic intelligence and develop recommendations.

(E) Prepare periodic domestic intelligence estimates which incorporate the results of the combined efforts of the intelligence community.

(F) Perform such other duties as the President may from time to time assign.

7. Meetings

The group shall meet at the call of the chairman, a member agency, or the White House representative.

8. Security

Knowledge of the existence and purposes of the group shall be limited on a strict "need to know" basis. Operations of, and papers originating with, the group shall be classified "top secret handle via Comint channels only."

9. Other Procedures

The group shall establish such other procedures as it believes appropriate to the implementation of the duties set forth above.

[TOP SECRET]

WEICKER CHARGES F.B.I. USED A PART OF 1970 SPY PLAN

Says Portion Took Effect Despite Nixon Assertion It Was Withdrawn

CITES MEMO BY AGENCY

Project, Reported Backed by Hoover, Involved Hiring of Student Informers

Special to The New York Times

WASHINGTON, June 10—Senator Lowell F. Weicker Jr. asserted today that "at least" one aspect of a 1970 domestic espionage plan had gone into effect despite President Nixon's declaration that it had been withdrawn.

The Connecticut Republican, a member of the Senate Watergate committee, cited an internal Federal Bureau of Investigation memorandum dated Sept. 16, 1970, two months after the July, 1970, plan had allegedly been withdrawn.

J. Edgar Hoover, the late director of the F.B.I., approved the hiring of "student informers" and "potential student informers" to report on campus activities, Mr. Weicker said the memorandum showed.

Objection by Hoover

The domestic security plan, which also called for burglaries and illegal mail interceptions, was said by President Nixon on May 22 to have been approved and then withdrawn at the request of Mr. Hoover.

One of Mr. Hoover's alleged objections, it has been reported, was to hiring students as informers. He was said to have objected for fear the students would "surface in the press."

"It is clear that at least this aspect [of the plan] was put into effect," Senator Weicker said. He was interviewed by Gabe Pressman for tonight's broadcast of "Gabe!" on WNEW-TV in New York.

Mr. Weicker also called on the President to "stand before the American people and tell them every single fact" about the Watergate scandals, adding that Mr. Nixon should not "play coy with the American people."

Dean on Dairy Industry

Meanwhile, Newsweek magazine reported in this week's issue that John W. Dean 3d had alleged that President Nixon knew that dairy industry contributions to his 1972 campaign had been aimed at winning an increase in milk price supports.

The ousted White House counsel has told "investigators," the magazine said, that Mr. Nixon was "personally aware" of the dairymen's gifts in 1971, totaling more than $300,000, and that he knew the funds were "intended to influence the Government."

It has been known that representatives of the industry met with the President in 1971 and that milk price supports were raised soon afterward. Newsweek said the White House had declined comment.

Dean Is Quoted

The magazine also attributed the following statements to Mr. Dean:

¶The White House, in an effort "to justify its own misuse of the F.B.I.," ordered a secret report on similar activity in past Administrations.

¶Some "low-level" White House officials considered assassinating Panama's ruler, Omar Torrijos, because they suspected the involvement of high Panamanian authorities in heroin traffic and because they felt the Government had been uncooperative about renegotiating the Panama Canal treaty. E. Howard Hunt Jr., a leader of the Watergate burglars, had a team in Mexico "before the

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WEICKER REPORTS USE OF SPY PLAN

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mission was aborted," Newsweek said.

The magazine also reported that Mr. Dean, who was discharged as the White House lawyer on April 30, had charged the President with awareness of efforts to cover up the Watergate scandal.

Gerald L. Warren, the deputy White House press secretary, said today that the President previously denied any involvment in a White House cover-up. Mr. Warren added:

"The White House will have no further official comment on this type of 'John Dean source' story, which uses the national media to create misleading impressions for what are quite clearly, self-serving purposes."

In other Watergate developments today, Secretary of the Interior Rogers C. B. Morton said he was opposed to further hearings by the Senate committee "because I think there's too big a tendency there to try people in a forum which is not designed for that."

Mr. Morton, interviewed on the C.B.S. News "Face the Nation" program, said he believed the courts "can get the facts out."

But George Bush, chairman of the Republican National Committee, supported the hearings. Mr. Bush said on N.B.C.'s "Meet the Press" program that he felt that "the more information out on this, the better."

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WHAT THE SECRET POLICE DID

In his legal brief to the nation two weeks ago clarifying and defending his role in the roiling whirlpool of Watergate, President Nixon sought to preserve a distinction between the illegal campaign espionage of the Committee for the Re-election of the President and the program of wiretaps and burglaries he had authorized in the name of national security. The line was fuzzy even as he drew it, and after last week's harvest of new clues to the Administration's secret-police operations—it had very nearly been erased.

The Senate's special Watergate committee uncovered such a cross-fertilization of campaign dirty tricks and "national security" skulduggery that it simply expanded its inquiry to include them both. And despite Mr. Nixon's assurances that his 1970 master plan for domestic spying had been shelved "unused," Senate investigators were looking into allegations that certain aspects of the controversial plan were operational even before the official birth of the White House "plumbers" group in the summer of 1971.

Senate probers, NEWSWEEK's Washington bureau learned, have been told by high Administration officials that illicit methods—including burglary and unauthorized wiretaps—were widely used to try to stop sensitive leaks, to monitor the domestic left and gather information for the prosecution of cases against radicals. The investigators have been told specifically that burglaries were committed in connection with the Seattle Seven, Chicago Weatherpeople, Detroit Thirteen and Berrigan cases. They are also looking into allegations that Administration operatives broke into the Brookings Institution, a respected Washington think tank, looking for information on former National Security Council staffer Morton Halperin.

Investigators were still not certain last week whether these operations were undertaken by the FBI or some other official security force or by a plumber-type squad run from the White House or somewhere else outside normal law-enforcement channels. But one Senate investigator called it doubtful that the regular agencies would have gotten formally involved; to the contrary, he said, there is "considerable evidence that they resisted using those methods in the kinds of cases the White House was pushing."

Shock: The kinds, as it developed, included not only foreign espionage but a range of domestic dissident activities—and the use of illicit means was rationalized, then as now, on the ground that the end was the nation's security. The justification was spelled out in the set of secret papers delivered by former White House counsel John W. Dean III to Judge John J. Sirica and thence to the Ervin committee—a portfolio including the 1970 spy plan. "From an intelligence point of view," one source quoted the papers as saying, "foreign espionage and sabotage . . . are just not separable" from domestic radical activities. Given this premise, the planners put together what Sen. Sam Ervin called a scheme for spying so widespread that it would be "a great shock to the American people" if it got out.

Senate investigators now believe that the covert operations that flowed from the plan were run by "a very, very narrow group of White House and Justice Department officials"; they are still putting together the who's who, but one name that intrigues them now is Robert C. Mardian, a ferociously anti-left protégé of former Attorney General Richard Kleindienst and onetime head of the Justice Department's Internal Security Division. Mardian is known to have inherited the plan late in 1970, well after Mr. Nixon says it was aborted; he has likewise been found to have worked on certain "security" matters with G. Gordon Liddy, the sometime White House plumber who later ran the Watergate break-in.

FBI: The investigators did not press the issue with Mardian in a wide-ranging, four-hour interview last week. But, NEWSWEEK learned, they did fish up some other fascinating scraps of information. It was Mardian, for example, who learned in the summer of 1971 that William Sullivan, then the assistant director of the FBI, was holding the logs of the seventeen FBI telephone taps authorized by the President and cleared in part by Henry Kissinger to plug some security leaks from 1969 to '71. According to Senate investigators, Mardian—who possessed a rare emergency phone line to the President's office—has told them that he informed the White House of his discovery and was ordered to fly immediately to San Clemente to meet with the President.

Mardian did so in late July (confiding to his seat-mate, John Dean, "This is so hot I can't even talk to you about it") and was ushered into Mr. Nixon's office. "The President told me," Mardian told the probers, "that the logs affected the most delicate decisions he was making,

Mardian: To Nixon with news

© Herblock in The Washington Post

National-Security Blanket

Liddy: To Denver with Dita

and his ability to function was imperiled by news leaks of the contents involved." Mardian said he was given direct orders by Mr. Nixon to take charge of the logs. On Aug. 1, he picked them up from Sullivan and "several days" later turned them over to the White House—where, as it developed, John D. Ehrlichman squirreled them away in his own office safe.

Mardian, NEWSWEEK learned, has also been giving the investigators some intriguing glimpses of what Liddy might have to say when he takes the stand this week—if, that is, he were talking at all. In their own extensive post-Watergate conversations, according to Mardian, Liddy said it was he who whisked ITT lobbyist Dita Beard out of Washington to a Denver hospital in the thick of the 1972 controversy over an offer by the company to help underwrite the Republican convention. Liddy, according to Mardian, further acknowledged taking part in the burglary of Daniel Ellsberg's psychiatrist's office; he claimed that it had the "express approval" of the President.

Charges: Predictably, the Washington inquiries have prompted second thoughts on several still unexplained break-ins. Democratic National Committee Chairman Robert Strauss has told Senate investigators of a mysterious ransacking of his Dallas home one week before the Democratic convention last July. Charles Garry, a San Francisco lawyer for the Black Panthers, claims that his offices were broken into at least twice in 1971—and personal papers were the major loss. And The Los Angeles Times reported that the FBI is investigating the possibility that Liddy and E. Howard Hunt burgled the offices of the NAACP-Legal Defense and Educational Fund, Inc. the weekend they hit Ellsberg's psychiatrist.

The individual charges remain to be sorted. But it is now evident that Nixonians did run secret-police operations against the moderate-to-radical American left—and that they were willing to ignore or break the law for what they judged to be the necessities of national security. They acted in turbulent times—a period when, as GOP Sen. Lowell Weicker of Connecticut said in a speech last week, "America or at least vocal America did want a quick and efficient end" to the tumult of the '60s. But their targeting was at times indiscriminate, their methods often jackboot crude. One of the Administration's proliferated spy shops took on a whole run of home-front intelligence assignments in 1971-72, ranging from a riot watch in the ghettos to a search for foreign connections in the peace movement. A reporter asked a well-wired government hand last week what methods the operatives involved had used. "I'm afraid," the official said wanly, "you'll have to use your imagination."

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New York Times 7/10/73

PLUMBERS' DATA REPORTEDLY KEPT FROM F.B.I. IN 1972

Gray and Petersen Are Said to Have Withheld C.I.A.'s Reports of Assistance

By DENNY WALSH
Special to The New York Times

WASHINGTON, July 9—For many months, two high Justice Department officials withheld information from Federal Bureau of Investigation agents that would have led the agents much earlier to the White House group set up to scrutinize Government leaks to newsmen, according to sources close to the F.B.I. Watergate investigation.

In early July of last year, less than a month after the Watergate break-in at Democratic national headquarters on June 17, the Central Intelligence Agency furnished the former acting director of the F.B.I., L. Patrick Gray 3d, with documentation of the aid provided by the C.I.A. to the cadre of White House operatives known as the "plumbers," the sources said.

They said that the three Federal prosecutors and F.B.I. field agents assigned to the Watergate case and related matters did not know that Mr. Gray had this material until it was discovered in his office safe after he resigned as head of the bureau on April 27.

Petersen Got Data

Last October, Henry E. Petersen, an Assistant Attorney General, obtained this information from the C.I.A. and, at the same time, learned that Mr. Gray had been in possession of the material for more than three months, according to the sources.

Mr. Petersen, then in charge of the Watergate investigation, did not pass on the material to the F.B.I. agents working on the case, the sources said, nor did he make it known that Mr. Gray had concealed the material, even when President Nixon nominated Mr. Gray in February, 1973, to be permanent director of the bureau.

Mr. Gray was not available for comment. When Mr. Petersen was reached through a public information officer at the Justice Department, he said he had "no comment."

The following information was pieced together by the New York Times after interviews with a number of persons familiar with the Watergate investigation and all its ramifications and from various public documents relating to the C.I.A.'s involvement with the Watergate conspirators.

The full scope of C.I.A. support of the "plumbers" was not known to the F.B.I. agents in the case until early in May, when it came to light independently of them, during the late stages of the trial of Dr. Daniel Ellsberg on charges growing out of his role in publicizing the Pentagon papers.

The agents are known to be angry that Mr. Gray and Mr. Petersen did not share the C.I.A. material with them, and contend that if they had had the information, much of what is now known about the "plumbers," including their burglary of Dr. Ellsberg's former psychiatrist's office, would possibly have emerged sooner.

A key element in the rancor of the agents is that part of the material that Mr. Petersen and Mr. Gray had, they believe, might have led them to knowledge of the burglary months before it was learned by Federal prosecutors in interviewing John W. Dean 3d, former counsel to the President, in April.

Included in the material turned over to Mr. Petersen by the C.I.A. on Oct. 24, according to the sources, was a photograph of G. Gordon Liddy, convicted Watergate conspirator, standing in front of the building in Beverly Hills, Calif., that houses the office of the psychiatrist, Dr. Lewis J. Fielding. Sources who have seen the picture said that a reserved parking space marked for Dr. Fielding could be seen in the background.

Both Mr. Petersen and Mr. Gray reportedly had information that E. Howard Hunt Jr., one of the Watergate conspirators who pleaded guilty, had requested that the C.I.A. have someone meet him upon his return from California on the morning of Aug. 27, 1971, to receive some film from him that he wanted processed and returned.

Developments in April and May of this year disclosed that Liddy and Hunt, both part of the "plumbers" group at the time, had engineered the burglary of Dr. Fielding's office on Sept. 3, 1971, as part of a search for information about Dr. Ellsberg. Hunt told the Watergate grand jury here in May that he and Liddy went to California in August, 1971, "to make a preliminary vulnerability and feasibility study" of Dr. Fielding's office.

Tells of Photographs

He said that they "passed through" the building in which Dr. Fielding had his office and took some photographs "with a very special camera."

Mr. Gray had known since July, 1972, and Mr. Petersen since October, 1972, that the C.I.A. had in the summer of 1971 provided Hunt with, among other things, a commercial Tessina camera disguised in a tobacco pouch, the sources said.

Records of the Beverly Hills Police Department show that the burglary was reported on Sept. 4, 1971, that a man arrested on Oct. 7, 1971, in connection with a theft from a woman's purse confessed to the burglary and that on Nov. 12, 1971, the man renounced the confession.

Some Justice Department officials feel it is "convenient hindsight" for agents to say they might have uncovered the participation of Hunt and Liddy in the burglary with the photograph and other information held by Mr. Petersen and Mr. Gray.

"They [the agents] never had a chance," a source close to the F.B.I. investigation said. "How can you say they wouldn't have gotten to the burglary, when the best leads in the Government's possession were concealed from them?"

In testimony before the Senate Watergate committee two weeks ago, Mr. Dean said that Mr. Petersen once had showed him the C.I.A. material and told him that Mr. Gray had the same material.

"The fact that this material was in the possession of the Department of Justice meant to me that it was inevitable that the burglary of Ellsberg's psychiatrist's office would be discovered," Mr. Dean said. "I felt that any investigator worth his salt would certainly be able to look at the pictures in the files at the Department of Justice and immediately determine the location and from there discover the fact that there had been a burglary at the office that was in the picture."

Included in the material given to Mr. Gray last July was a rundown on how the C.I.A. had furnished alias documents to Hunt in July, 1971, in the name of Edward Joseph Warren, and in the name of Edward V. Hamilton during the more than 20 years Hunt served as a C.I.A. agent. It was also recounted in the documents turned over to Mr. Gray how the C.I.A. had furnished Liddy with alias documents in the summer of 1971 in the name of George F. Leonard.

For six weeks to two months following the June 17 break-in, F.B.I. agents all over the country worked to prove to the satisfaction of the prosecutors the true identities of the persons who had obviously traveled widely under those aliases. This required the laborious comparison of handwriting samples and fingerprints from hotel and airline records and the identification of pictures of Hunt and Liddy by hotel and airline employes.

During much of this time, according to the sources' reports, Mr. Gray had evidence that would have immediately satisfied the prosecutors—the C.I.A.'s own record of the help it gave to the "plumbers." Mr. Petersen learned in October that the acting F.B.I. director had remained silent while supervising his agents' tedious efforts on the aliases.

When Mr. Petersen received the material from the C.I.A., it reportedly included transmittals to Mr. Gray dated July 5 and July 7, 1972.

However, when the prosecutors were finally allowed to review the C.I.A. material 33 days after Mr. Petersen obtained it, there was nothing in the documents they saw to indicate that Mr. Gray had the same material, and Mr. Petersen did not mention that fact to the prosecutors, even though he had given Mr. Dean, the Presidential counsel, that information around the same time, according to Mr. Dean.

The C.I.A. documentation was turned over to Mr. Petersen in response to a series of questions submitted to the agency by Earl J. Silbert, principal Assistant United States Attorney in the District of Columbia who was then the chief prosecutor in the Watergate case. Richard Helms, then director of the C.I.A., arranged to turn over the material to Richard G. Kleindienst, then Attorney General.

In a telephone interview, Mr. Kleindienst said that the material was delivered to him in a manila envelope and that he delivered it to Mr. Petersen without opening it. He said that he never knew what was in the envelope.

Mr. Kleindienst strongly urged the President to nominate Mr. Gray to head the F.B.I. on a permanent basis.

Kleindienst Comments

The former Attorney General, who stepped down rather than involve himself in a Watergate investigation that led repeatedly to his personal friends and political associates, indicated he was not aware of Mr. Gray's possession of the C.I.A. material.

Asked why Mr. Petersen did not give the material to the F.B.I. agents in the case, Mr. Kleindienst said:

"Mr. Petersen would have shown it to anybody, I'm sure, who he felt should have seen it in connection with any legitimate investigation. He wouldn't have shown it to anybody who he didn't feel needed to see it.

"Henry didn't secrete anything for devious reasons, nor did he in any way impede the investigation. I know Henry well, and I know that his only interest was to have a fair, intensive investigation. He wasn't involved in a witch hunt, but he was interested in anything that bore on the investigation."

Mr. Gray was apparently given the C.I.A. information as a result of his liaison with Lieut. Gen. Vernon A. Walters, deputy director of the intelligence agency.

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Spying, Missions and 2 Wiretaps Laid to Ehrlichman by Officials

N.Y. Times
6/6/73

By SEYMOUR M. HERSH
Special to The New York Times

WASHINGTON, June 5—John D. Ehrlichman, President Nixon's former chief domestic adviser, authorized a series of espionage missions and at least two previously undisclosed illegal wiretaps, beginning in 1969 that were carried out by an aide to White House intelligence groups, officials knowledgeable about the Watergate investigation said today.

In addition, the officials said, detailed planning for a number of White House-ordered burglaries was authorized by Mr. Ehrlichman, although it could not be learned whether any such burglaries—including a planned foray into the Brookings Institution here—actually took place.

Most of the operations were coordinated by John J. Caulfield and Anthony T. Ulasewicz, two former New York City policemen who began working for the White House in early 1969, the officials said, including an investigation into the background of Mario Biaggi, who was defeated in yesterday's New York mayoral primary.

Mr. Biaggi, a freshman Representative from the Bronx in 1969, bitterly criticized as "insulting" to Italian-Americans an early Nixon crime message to Congress calling for an attack on organized crime.

In addition, Mr. Ehrlichman's and Mr. Caulfield's informal White House group—described by knowledgeable sources as a successor to the "plumbers" operation set up by Mr. Nixon to investigate the Pentagon papers leak—also questioned a number of participants in and eyewitnesses to the massacre at My Lai in South Vietnam in late 1969 or early 1970 to determine if the first newspaper accounts of the atrocity were correct.

One Government investigator said that a full description of the White House group's work would be provided to the Senate Watergate committee by John W. Dean 3d, the former White House counsel, who is scheduled to testify next Wednesday, barring court intervention.

Testimony by Caulfield

In his televised testimony last month before the Senate Watergate committee, Mr. Caulfield, a former undercover policeman in New York, gave a far from complete description of his initial assignment inside the White House.

"During the first three years," he said, "first on orders from Mr. Ehrlichman and later, in some instances, on orders from [illegible] Ulasewicz, under my supervision, performed a variety of investigative functions, reporting the results of his findings to the White House through me. I do not fully recall all of the investigations performed in this fashion."

Officials said that, in addition to about 18 clandestine intelligence missions, Mr. Caulfield and Mr. Ulasewicz were directly involved in the installation of a wiretap on telephone lines leading to the Georgetown residence of Joseph Kraft, the syndicated columnist.

A source who was closely involved said that the wiretap was installed in early 1969 at the express direction of Mr. Ehrlichman. "Caulfield didn't do it personally," he said, "but got someone else to look at it."

At one point before the installation of the wiretap, the source said: "Caulfield asked Ehrlichman why they [the White House] didn't go to the F.B.I. since he had been told to put it in for national security purposes."

One was told by Ehrlichman, 'Well, the F.B.I.'s a sieve. Things get out that way.'"

A wiretap was installed and began to operate, the same source said, although Mr. Kraft was out of town at the time. Before the columnist returned, he said, Mr. Ehrlichman got in touch with Mr. Caulfield "and said to forget it; they had it another way."

The source said that Mr. Caulfield assumed that the White House had prevailed upon J. Edgar Hoover, then the director of the Federal Bureau of Investigation, to take over the bugging of Mr. Kraft.

Mr. Caulfield ordered his men to return to the Kraft residence and remove the wiretap, the source said, a high-risk operation involving the use of a ladder outside the second floor of the home.

Mr. Caulfield knows of at least one other wiretap that was installed on Mr. Ehrlichman's orders outside the normal F.B.I. channels, the official source said. That wiretap involved someone "in the family," he added cryptically, in an apparent reference to someone in the Administration.

It could not be learned whether the federal prosecutors in the Watergate case were planning to conduct a separate investigation into the allegations of illegal wiretapping.

Both the prosecutors and the Senate Watergate committee are known to have received full accounts of the ad hoc White House group's activities from Mr. Dean, Mr. Caulfield and Mr. Ulasewicz.

One closely involved person said that the planned break-in at the Brookings Institution, a liberal Washington research group, was discussed sometime in 1971, Mr. Caulfield was told, the source said, that high White House officials "wanted some papers out of somebody's file." He did not know, he said, whose file was involved.

It has been widely reported that President Nixon personally authorized the wiretapping of 13 National Security Council and Pentagon aides as well as four newsmen in May, 1969, after what officials described as a serious news leak.

Halperin at Brooklings

In late 1969, Morton H. Halperin, then a member of the council staff, resigned and became associated with Brookings, a relationship he still maintains. Mr. Halperin has also been associated with Dr. Daniel Ellsberg, whose Federal trial on charges stemming from his copying and releasing of the Pentagon papers recently ended when the judge dismissed the case because of the misconduct of the Government. The papers were classified Government documents about the origins of the Vietnam war.

There is some evidence that Mr. Caulfield's and the group was supplanted, at least in some aspects, by the plumbers operation, which was organized in July, 1971.

In a civil suit deposition released today, Mr. Ehrlichman is quoted as confirming that in September, 1971, G. Gordon Liddy, the former member of the plumbers group who later led the Watergate break-in team, was initially introduced "as the new man in place of Caulfield."

And Mr. Caulfield, in his Senate testimony, has noted somewhat plaintively that "in the spring of 1971, I began to notice that, for some reason, the amount of investigation work [I was] given by Ulasewicz through [me had diminished."

One closely placed source said that one of the main functions of Mr. Ulasewicz, who had been hired through Mr. Caulfield after spending 20 years in police work, was to attempt to infiltrate large demonstrations in Washington. "They would just stand around with them and listen," the source said. "It was silly and they might just as well have had the local police do it."

It has been previously reported that Mr. Ulasewicz was hired by Mr. Ehrlichman after a clandestine meeting in mid-1969 at La Guardia Airport and paid in cash by Herbert W. Kalmbach, who was then President Nixon's personal attorney. The funds for Mr. Ulasewicz were reported to have been authorized by H. R. Haldeman, the former White House chief of staff.

Both Mr. Caulfield and Mr. Ulasewicz achieved national prominence during the first of the televised Senate Watergate hearings last month when it was alleged that they had both participated in a White House-directed effort early this year to offer executive clemency to James W. McCord Jr., one of the Watergate conspirators, in return for his silence.

One knowledgeable official said that most of the Caulfield-Ulasewicz assignments "involved specific events that already happened." He added, "They were just checking out press reports to seek what else they could learn that wasn't in the newspapers—like My Lai."

"That's not illegal," the official declared.

Asked if Mr. Ehrlichman was directing the White House intelligence operation, the official said: "Oh God, yes. Caulfield wasn't thinking these things up."

The only surveillance project that was initiated by the two men was the investigation into the background of Mr. Biaggi, their former colleague on the New York police force, the official said, although that effort also received White House sanction.

Mr. Biaggi's sharp attacks on the Presidential crime message began in early May, 1969. In one news conference, Mr. Biaggi said that he had been troubled by Mr. Nixon's message in which he sought "out Italian-Americans for undeserved notoriety while there are organizations in existence who openly exhort violence and whose acts border on treason"—an apparent reference to radical antiwar groups.

5 Other Inquiries

The source said that Mr. Caulfield and Mr. Ulasewicz both suspected that Mr. Biaggi had some connections to organized crime, a suspicion they apparently could not confirm with their clandestine research.

The two men have been publicly linked to at least five other undercover investigations in 1969 and 1970 with various political overtones.

These included research into the Chappaquiddick incident involving Senator Edward M. Kennedy, Democrat of Massachusetts, in 1969; a potentially [illegible] involving Representative Carl Albert, Democrat of Oklahoma, the House Speaker, possible financial links between Senator Edmund S. Muskie, Democrat of Maine, and some corporations with pollution problems; the funding of Senator Hubert H. Humphrey's 1968 campaign for the Presidency, and rumors that the brother of a leading Democrat might have been involved in a homosexual incident.

In addition, Mr. Caulfield and Mr. Ulasewicz also reportedly investigated the alleged harassment of Mrs. David Eisenhower by a Florida school teacher. Mrs. Eisenhower is President Nixon's younger daughter, Julie.

Mr. Ulasewicz is now living in Hadley, N. Y. Mr. Caulfield was dismissed last month from his post as assistant director of the Treasury Department's Bureau of Alcohol, Tobacco and firearms.

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F.B.I. Informer Is Linked To Right-Wing Violence

By STEVEN V. ROBERTS
Special to The New York Times

SAN DIEGO, June 23—A leader of a right-wing, paramilitary organization that harassed young leftists here for more than a year says that the group was partly organized and financed by an informer for the Federal Bureau of Investigation. Law enforcement officers and others familiar with the situation corroborated his account.

The informer, Howard Berry Godfrey, participated in a shooting, as well as several fire-bombings and burglaries, while receiving regular payments from the F.B.I. for his services, it was said.

This account was provided this week by Jerry Lynn Davis, the former Southern California coordinator for the Secret Army Organization, a well-armed outgrowth of another right-wing group, the Minutemen.

Segretti Recognized

In another development this week, two members of the Secret Army Organization reportedly recognized a photograph of Donald H. Segretti, the young lawyer accused of organizing a Republican espionage campaign last year. According to The Door, a local radical newspaper, the two rightists identified the man in the photograph as "Donald Simms," whom they said they met in the summer of 1971 at a shooting range frequented by members of the Secret Army Organization.

The two men reportedly said that "Simms" was present at a discussion among the right-wingers about the Republican National Convention, originally scheduled to be held in San Diego last August before it was moved to Miami Beach. "Simms" did not participate in the discussion but an unidentified companion did, according to The Door's sources.

Mr. Segretti, who has been indicted for distributing false campaign literature in Florida, often used the name "Donald Simmons" in recruiting espionage agents.

It is also known that Mr. Segretti and the Secret Army Organization at different times discussed the idea of abducting radicals who might disrupt the convention. But so far, there has been no firm evidence linking Mr. Segretti to the right-wing group.

Davis, a 31-year-old construction worker, spoke to a reporter after being released last Thursday from jail, where he had been held pending his sentencing on a charge of possession of explosives. The Secret Army Organization coordinator had pleaded guilty and was granted probation.

According to Davis's account, the Secret Army Organization was formed in 1971 to train guerrillas who could organize a resistance movement should the United States be conquered by a foreign power. Howard Godfrey, the F.B.I. informer, was one of the six founding members and contributed the money used to print the group's recruiting literature, Davis said.

In addition, Godfrey was considered a "firebrand" within the organization and took a "more militant line" than most members, Davis said.

According to his own court testimony, Godfrey was riding in a car on Jan. 6, 1972, when another member of the Secret Army Organization fired a shot into a house occupied by young leftists. The bullet shattered the elbow of a girl named Paula Tharp. Miss Tharp and other residents of the house were planning demonstrations at the Republican convention.

Godfrey took the gun used in the shooting and gave it to his F.B.I. contact. The agent hid it under his couch for six months until the Secret Army Organization member who shot Miss Tharp was finally apprehended by the police. The incident cost the agent his job.

'Antipoverty Program'

Given Godfrey's contributions to the Secret Army Organization in time and money, Davis said, "you might say that the S.A.O. was a federally funded antipoverty program for the right wing."

Godfrey's role was partly disclosed last June, when a member of the Secret Army Organization was arrested for blowing up a movie theater that showed pornographic films.

According to well-informed sources, the San Diego police learned that the F.B.I. had an informer within the right-wing organization, but the bureau refused to disclose his identity. When the police chief threatened to expose the bureau's lack of cooperation the F.B.I. agreed to let Godfrey testify against the bomber.

On the stand, Godfrey admitted that he had supplied the explosives used in the bombing.

Asked why Godfrey was allowed to operate for so long, a spokesman for the F.B.I. here said that "we certainly don't condone" illegal acts by informers. But he declined to comment further.

New York Times, 6/24/73

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

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JEFFREY SMILOW, being duly sworn, deposes and says:

1. I reside at 1050 54th Street, Brooklyn, New York.

2. I have been a member of the Jewish Defense League since approximately November, 1968.

3. The JDL was established in 1968 for the purpose of protecting Jews from anti-semitic attacks. We began helping New York Jews and then expanded our work to attempt to help Jews all over the world. We held demonstrations to express our solidarity with Jews who were suffering persecution in other countries, namely Russia and the Arab countries, and to protest anti-semitic policies in those countries. We attempted to force the American government to take action to combat anti-semitism at home and abroad. Besides demonstrations we published leaflets and held education programs to try to make people aware of the prevalence of anti-semitism in the United States and throughout the world. Our guiding principle is expressed by the Hebrew words "Ahavat Yisroel", which means love of Jews. We wanted to teach Jews to help other Jews in whatever way they needed, and to sacrifice for them.

4. During my first year of JDL membership (1968-69) I went to several demonstrations and was fairly active in local JDL activites. I went to most meetings and neighborhood patrols. The following school year (1969-70) I was not very active in JDL but the following school year, beginning in September of 1970 I was very active in the organization. I went to all demonstrations

and often worked in the office which was then at 440 W. 42nd Street, and attended meetings there. I talked on the telephone at that office. During the summer of 1971 the JDL office moved to 4002 New Utrecht Avenue in Brooklyn. I spent every evening there and went to every JDL activity there in both daytime and evening. I spent at least three or four hours a day there all summer. When school began, I started cutting classes and by January I was spending eight hours a day in the office. My job was director of publicity and public relations. I ran the mimeograph machine and had to make sure we always had a complete supply of our educational materials. I made all of our leaflets, press releases etc. Before handling publicity I was in charge of our mailings to membership. I took classes at night at the office. I had a key to the office and frequently opened it in the morning. I occasionally stayed very late and once spent the night in the office. After January 1972 I was paid $15.00 a week. I was on the administrative board where I reported on my work. In approximately February or March I was elected to our executive board which made organization policy.

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5. I have talked to many JDL members on the telephone including Sheldon Siegel.

6. My lawyers in connection with this matter have been Hyman Bravin, Nathan Lewin, Stanley Cohen, Martin Elefant, Bertram Zweibon, Barry Slotnick and Robert Leighton. Their telephone numbers are annexed to this affidavit.

JEFFREY SMILOW

Sworn to before me this
1st day of November, 1973

NOTARY PUBLIC

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STATE OF NEW YORK
ss.:
COUNTY OF NEW YORK

JEFFREY SMILOW, being duly sworn, deposes and says:

1. When the JDL office was on New Utrecht Avenue in Brooklyn we frequently saw as many as seven FBI cars and New York City BOSS cars parked near the headquarters. I know that they were FBI and BOSS cars because the men inside them told our members who they were and that we were under surveillance. On information and belief some of our members were followed by these men and people coming and going from our office were photographed. I saw cameras in the cars. And I saw them take pictures of us.

2. Frequently in the morning when we arrived at our office we found the metal doors to the basement lifted off. All JDL files were kept in the basement.

Sworn to before me this
1st day of November, 1973

JEFFREY SMILOW

NOTARY PUBLIC

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JEFFRY SMILOW: PHONE CALLS

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EXHIBIT A

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EXHIBIT A

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff	
v.	Indictment No. 14886
AHMAD, et al., Defendants	

STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES)

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE, FOR A PRE-TRIAL HEARING, TO SUPPRESS EVIDENCE AND TO DISMISS THE INDICTMENT.

MICHAEL E. TIGAR, being sworn, deposes and says:

1. I am making this affidavit in support of the defendants' motion to disclose electronic surveillance, and to inform the Court of the need for an evidentiary hearing on said motion.

2. In my experience as defense counsel in a number of cases involving illegal electronic surveillance, I have discovered a great deal concerning the techniques of the Federal Bureau of Investigation in conducting such surveillance and then concealing the fact of surveillance even from Justice Department attorneys, and concealing the fruits of such surveillance from defendants indicted, in part, as a result of evidence obtained by unlawful means. The assertions below arise from my representation of the defendants in the following cases, or (in some cases) from my

association with the defense counsel who were in the same law firm as I. The cases in question are United States v. Fred Black, Jr., District of Columbia; United States v. Bernard McGarry, Massachusetts; United States v. Robert G. Baker, District of Columbia; United States v. Ivanov, New Jersey; United States v. Nesline, District of Columbia; United States v. Dellinger, Chicago; United States v. H. Rap Brown, New Orleans; United States v. Roselli, Los Angeles; United States v. Marshall, Seattle; United States v. Smith, Los Angeles; United States v. Alderman and Alderisio, Denver.

3. Based on my experience in these and other cases, I know that the Federal Bureau of Investigation keeps files on persons by name. Each such file is maintained in an FBI field office or at FBI headquarters ("the seat of government", in FBI parlance) in Washington, D.C. Sometimes, more than one office will have an open file on a particular individual. These files are kept by number. All documents and reports about the individual in question are filed in chronological order in such files. In addition, all names of persons on such documents and reports are separately indexed. Thus, if at any time the FBI wants to open a new file on someone, an "indices check" is run to gather up all information in other files relating to that individual. The documents and reports making up the file consist in large part of FBI Forms 302, standard FBI Special Agent report forms.

4. The FBI "case agent", or agent assigned to keep a file, may have a number of files under his control at one time. He is the actual custodian of the file. However, he receives reports from many sources,and may not be aware of the identity of all these sources. For example, an FBI agent in Washington, D.C., may receive information for the Las Vegas Field Office that "LV-90-C*" reported that two named individuals had a conversation. Only by decoding the number of the anonymous "LV-90-C*" can the agent know whether it represents an anonymous live informant or an electronic device. FBI agents in the Black and Baker cases both admitted under cross-examination that they often were unable to tell from looking at their own case files whether a given item of information emanated from a live informant or a bug. It was necessary to trace each item of information in the file back to its source and to determine this fact. Thus, in the Baker case, FBI case agent Paul Kenneth Brown did not know that several items of information on Robert G. Baker which had been in his possession for years had come from an illegal bug until he traced those items back into the FBI case file on another individual and made this determination. These facts illustrate the need for a hearing.

5. Further, when an FBI agent knows that information he has received emanated from an unlawful source, he will conceal

this fact from his superiors and from others who may read the case file. In the H. Rap Brown case, FBI case agent Heibel testified that he learned from the New Orleans Police Department that Brown had conversations with his attorney, William M. Kunstler, and that these conversations had been wiretapped by the New Orleans authorities. Agent Heibel made a memorandum embodying the contents of these confidential lawyer-client conversations, but said in the memorandum that a "confidential informant" had told him the information. This memorandum was placed in the FBI case file on H. Rap Brown. Thus, no one other than Heibel would know from reading the file that it contained material emanating from an unlawful electronic device.

6. Another practice of illegal wiretappers and surveillance experts, such as FBI agents, is isolation of illegally-obtained material from other material in the FBI file. It is the admitted practice of FBI agents to set up, in addition to the main "case file," a "sub-two" file of confidential material from both live and electronic sources. This sub-file is kept separate from the rest of the file, and all its pages are labelled "June", which is an FBI code word for "Secret". Agents Paul Kenneth Brown and Robert Heibel admitted to me under oath the existence of "June" and "Sub-two" files. It is reasonable to suspect that such files would be especially useful to the FBI in so-called "national security" cases.

7. Electronic surveillance is not limited to the FBI. Various Justice Department officers have at various times parti-

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cipated in such surveillance, obtaining authorizations to conduct it without clearing with the FBI. Such was the case in United States v. Baker. Moreover, the Organized Crime Division of the Department of Justice and one of its co-ordinators, Owen Burke Yung, repeatedly made use of illegal surveillance and destroyed the records of such surveillance. The tapes made from wiretapping were merely listened to, used to gain investigative leads, and then erased. A search of Justice Department files without an oral hearing to determine the extent of surveillance would not ensure any defendant that his or her rights under the Alderman decision were being protected.

Michael E. Tigar

Sworn and Subscribed to
before me this 11th day
of April, 1971

Gail L. Zook

OFFICIAL SEAL
GAIL L. ZOOK
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Sept. 13, 1972

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EXHIBIT A

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EXHIBIT A

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OPINION OF JUDGE GRIESA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. RICHARD HUSS, Defendant.	73 Cr. Misc. 25
UNITED STATES OF AMERICA v. JEFFREY H. SMILOW, Defendant.	73 Cr. Misc. 24 OPINION

GRIESA, J.

These are two criminal contempt cases brought on by orders to show cause signed by Judge Bauman on June 28, 1973. The trials were originally scheduled for July 1973, but were adjourned for several reasons, including the need to permit defendants time to change counsel. Both cases arise from the refusal of defendants to testify as witnesses in a criminal case before Judge Bauman. United States v.

Stuart Cohen and Sheldon Davis (72 Cr. 778). The latter case arose from the bombing on January 26, 1972 of the New York offices of Columbia Artists Management, Inc. and the impresario Sol Hurok. As a result of the refusal of these defendants to testify, the Government was unable to proceed, and the case was terminated.

Both defendants now move for production of any and all types of documentary materials relating to electronic or other surveillance which might have been carried out by any governmental agency or private party concerning (1) communications to which defendants were parties; (2) communications of members of the Jewish Defense League; (3) communications at any place in which defendants had an "interest"; and (4) various other types of communications that might relate to defendants. The motion requests that, if records of such surveillance are non-existent, certain information about the surveillance should be provided.

The basic purpose of requesting this material is to lay a basis for a possible argument that the Government learned of defendants' identity from illegal surveillance, and that any evidence they might have given at the criminal trial would therefore have been tainted.

Defendants also move for disclosure of statements made by them to government personnel.

Defendants also move to dismiss the contempt charges against them on two grounds: First, that the immunity granted to them at the trial before Judge Bauman was insufficient to protect their rights under the Fifth Amendment; second, that the applicable statute and rule providing for criminal contempt -- 18 U.S.C. § 401 and F.R. Cr. P. 42 -- are unconstitutional in that there are no specified limits placed upon the punishment which can be imposed for criminal contempt.

The motions are denied in all respects.

The prior procedural steps in this matter, and most of the relevant facts, are set forth in the opinion of the Court of Appeals in United States v. Richard Huss, Jeffrey H. Smilow and Sheldon Seigel, 482 F.2d 38 (2d Cir. 1973). The Court of Appeals affirmed the civil contempt citations of Judge Bauman against defendants Huss and Smilow, while reversing the civil contempt citation against another prospective witness at the criminal trial -- Sheldon Seigel. The precise questions involved in that case will be described in more detail shortly.

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On June 19, 1972 Stuart Cohen and Sheldon Davis, as well as Sheldon Seigel, were indicted in the Southern District of New York for the January 26, 1972 bombing. A superseding indictment was filed on July 3, 1972, charging these three defendants plus a fourth, Jerome Zellerkraut.

Prior to the first of these indictments Smilow had appeared before the grand jury, but refused to testify on several grounds. One of the grounds was an assertion that the grand jury questions had been derived from information acquired through illegal electronic surveillance on a telephone at the office of the Jewish Defense League. Smilow also contended that his religious beliefs forbade his acting as an informer.

Smilow was held in contempt by the District Court in a civil contempt proceeding. This judgment was affirmed by the Court of Appeals. 465 F.2d 802. Smilow petitioned for certiorari to the Supreme Court. In a memorandum submitted to the Supreme Court, the Government admitted for the first time "that there is a possibility that petitioner was overheard in the course of an electronic surveillance conducted with the approval of the Attorney General in the interests of national security." After receipt of this memorandum the Supreme Court remanded the proceedings to the Court of Appeals for further consideration. 409 U.S. 944.

The Court of Appeals in turn remanded the matter to the District Court to determine whether Smilow's conversations were the subject of government wiretapping and whether such surveillance was illegal. 472 F.2d 1193. The order of civil contempt in connection with the grand jury proceedings was subsequently dismissed on the Government's motion.

Trial of the criminal action was originally scheduled to commence in February 1973. However, on February 2, 1973 the Government moved to sever Sheldon Seigel from the trial on the ground that Seigel was a government informer who would be called as a witness at the trial under a grant of immunity.

Seigel moved for an order preventing the Government from calling him as a witness on the ground that any questions the Government intended to ask him would be based on information gleaned from illegal electronic surveillance and other violations of his constitutional rights. In response to this motion the Government admitted the existence of illegal F.B.I. wiretapping involving Seigel. Judge Bauman thereupon held a taint hearing to determine the validity of Seigel's claims, resulting in a denial of Seigel's motion on April 25, 1973.

Trial of the criminal case commenced on May 30, 1973 and Seigel was called as the Government's first witness. Seigel refused to answer the questions posed to him, and was held in civil contempt pursuant to 28 U.S.C. § 1826(a).

The next witness called by the Government was Huss. However, before questioning of Huss began, Judge Bauman adjourned the trial for one week, during which time the Government was directed to determine whether the Central Intelligence Agency had conducted electronic surveillance of several persons involved in the case. On June 8, 1973 the Government denied the existence of such electronic surveillance as to Seigel and all others involved in the case.

The trial reconvened on June 8. Seigel was recalled to the stand and was granted immunity, but refused to answer questions regarding the Hurok bombing, and was again held in civil contempt.

Huss and Smilow were then called as witnesses and granted immunity under 18 U.S.C. § 6002. They refused to answer questions and were held in civil contempt. Huss and Smilow were committed to a federal detention center for a period not to exceed the duration of the court proceedings, but in no event in excess of 18

months, or until they decided to testify. 28 U.S.C. § 1826(a).

Seigel, Huss and Smilow appealed to the Court of Appeals. 482 F.2d 38. The Court reversed and vacated the order of civil contempt against Seigel.

The Court considered that there was a possibility that an illegal FBI wiretap on the offices of the Jewish Defense League in Brooklyn may have been the source of the Government's knowledge of Seigel's identity. The Court also took the view that Seigel was disabled from effectively litigating the taint question because the Government had destroyed the tapes of the illegal wiretaps.

However, the Court of Appeals affirmed the civil contempt citations against Huss and Smilow. The Court rejected Huss's argument that he was not required to testify because Jewish law forbade him to testify against a fellow Jew in a non-Jewish court.

The Court also rejected the three arguments advanced by Smilow: (1) the contention based upon Jewish law; (2) a double jeopardy argument; (3) the contention that his refusal to testify was justified because there was illegal electronic surveillance of Jewish Defense League offices and the tapes of such surveillance had been destroyed. In connection with the latter argument, the Court

stated:

> "At no time did Smilow's counsel request a hearing, nor did he suggest that the government's questioning of Smilow had been tainted by illegal electronic surveillance. ... It was abundantly clear to counsel that Seigel, not the wiretap, was the source of the government's information concerning Smilow. Since Smilow never moved to suppress, nor even remotely suggested to the court that a proper claim of taint was before it, we conclude that Smilow lacked just cause in refusing to answer questions at trial. Accordingly, the order of civil contempt against him is affirmed." 482 F.2d at 52.

The Court of Appeals opinion was handed down on June 26, 1973. On June 27, 1973 the criminal trial before Judge Bauman was reconvened. Both Huss and Smilow were again called as witnesses, again ordered to testify, and again refused. They were expressly warned that their conduct would lead to prosecution for criminal contempt. On June 28, 1973 Judge Bauman signed orders to show cause commencing the present criminal contempt proceedings.

The discovery materials now sought by defendants are completely outside the issues posed by the present criminal contempt proceedings. These materials relate to possible electronic and other surveillance, and would only be relevant on the questions of whether the government obtained knowledge of defendants' identity through illegal means, and whether the proposed questioning of defendants

at the criminal trial was tainted -- all bearing on the ultimate issue of whether defendants had just cause for refusing to testify.

But these were matters which defendants either raised, or should have raised, in the civil contempt proceeding before Judge Bauman and in the appeal to the Court of Appeals, which resulted in the ruling of June 26, 1973. Defendants and their counsel were fully apprised of the possible problems regarding illegal wiretapping and the taint issue. They made their own strategic decisions about what they would or would not argue before Judge Bauman and the Court of Appeals.

At the session before Judge Bauman on June 8, 1973, prior to the appeal to the Court of Appeals, Huss's attorney argued that the Government had learned of Huss through illegal wiretaps and illegal pressure put on Sheldon Seigel (Tr. 135). When Huss himself was explaining the grounds for refusing to testify, he mentioned the problem of self-incrimination and the religious objections, but did not refer to illegal wiretapping or taint (Tr. 137). After Judge Bauman had signed the immunity order (Tr. 138-39), Huss's attorney again explained his client's objections to testifying, and referred only to the religious issue (Tr. 142-44). Still later, Huss reiterated his objections, and referred only to religion (Tr. 148-49).

Following Judge Bauman's announcement that Huss was in contempt of court, Huss's attorney stated that Huss would appeal to the Court of Appeals on both the religious issue and the question relating to taint (Tr. 155). However, Huss's brief on appeal made no mention of the taint question, and relied solely upon the religious contention. When the criminal trial resumed before Judge Bauman on June 27, 1973 after the ruling of the Court of Appeals, Huss's only objection to answering the questions was based on religious grounds. No mention was made at that time of illegal wiretapping or taint (Tr. 250).

With regard to Smilow, in the June 8, 1973 session before Judge Bauman, Smilow's attorney, upon learning that the wiretap tapes had been destroyed, asked that "on this basis alone" Smilow not be called as a witness (Tr. 180). Smilow's attorney also argued that the information which was the basis for the questioning of Smilow had been obtained from recordings made by Seigel (when wearing a wire recorder on his body), and that since Seigel was then acting as a Government informant, information obtained from such recordings was illegal (Tr. 182-83). Smilow, in explaining his refusal to answer questions, reiterated the latter argument, and stated other objections based upon claims of religious freedom and double jeopardy (Tr. 186-87). As the Court

of Appeals pointed out (482 F.2d at 52), Smilow did not argue before Judge Bauman that the questioning of Smilow had been tainted by illegal electronic surveillance carried out by the Government, and Smilow made no request for a taint hearing. It was clear, as the Court of Appeals held, that Seigel, not the wiretap, was the source of the Government's information concerning Smilow. The Court of Appeals concluded that Smilow had no valid basis for refusing to answer questions at the criminal trial.

At the renewed proceedings before Judge Bauman on June 27, 1973, Smilow's attorney applied for a hearing to determine whether the Government had overheard Smilow by means of illegal wiretaps. Judge Bauman denied this application (Tr. 268-270). Smilow s attorney also objected to the questioning of Smilow on a somewhat different taint theory. The argument was that the Government's information about Smilow's identity had come from Seigel, and the Government's information about Seigel had come from illegal wiretapping (Tr. 264-65). Judge Bauman overruled this objection.

Presumably Huss and Smilow now, on the criminal contempt actions, wish to put forward in expanded form the arguments which Smilow made for the first time before Judge Bauman following the decision of the Court of Appeals --

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(1) that there should be a full evidentiary hearing to determine whether information about Huss and Smilow was obtained through illegal surveillance; and (2) that in any event the questioning of Huss and Smilow was derivatively tainted because the identity of Huss and Smilow was obtained from Seigel, whose identity was in turn obtained from illegal sources. But it is perfectly clear that these arguments were fully available to Huss and Smilow in the civil contempt proceedings before Judge Bauman and in the appeal to the Court of Appeals. These proceedings dealt with, and disposed of, the fundamental question of whether Huss and Smilow had any "just cause" for refusing to testify. 28 U.S.C. § 1826(a). The Court of Appeals ruled conclusively that Huss and Smilow had no valid basis for such refusals. Surely these defendants are not entitled to litigate this issue afresh. For these reasons the discovery requests of defendants for materials regarding surveillance are denied.

Defendants' motion to dismiss the contempt proceedings can be dealt with briefly. First, they contend that the grant of use immunity under 18 U.S.C. § 6002 was insufficient, because, by testifying truthfully at the criminal trial, they might have indicated the falsity of certain prior statements to Government agents, thus

exposing themselves to possible criminal prosecution for such false statements. Defendants refer to the language of Section 6002, providing that no testimony or information compelled under the immunity order may be used against the witness in any criminal case "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order". Defendants rely on In re Baldinger, 356 F. Supp. 153 (C.D. Cal. 1973).

However, in Kastigar v. United States, 406 U.S. 441, 453 (1972), the Supreme Court held that the immunity provided by Section 6002 is coextensive with the scope of the constitutional privilege against self-incrimination. The thesis of the Baldinger case -- that testimony under an immunity order can be used as a basis for criminal prosecution for prior false statements, and that therefore the use immunity statute is not fully protective of the privilege against self-incrimination -- has been expressly rejected in at least two cases, which hold that Section 6002 permits prosecution only for perjury or other false statements made at or after the time of the granting of the immunity order. Application of the U.S. Senate Select Comm. on Presidential Campaign Activities, 361 F. Supp. 1282 (D.D.C. 1973); United States v. Doe, 361 F. Supp. 226 (E.D. Pa.), aff'd without opinion sub nom. Appeal of Calahane, 485 F.2d 678 (3d Cir. 1973). The latter authorities appear to be correct.

Defendants' request for disclosure of statements made by them to government agents is related to the above contention regarding the alleged failure of Section 6002 to protect them from prosecution for the possible falsity of such statements. Since I have rejected defendants' contention in this regard as a matter of law, there is no reason for the production of such statements, if there are any.

Defendants also move to dismiss the criminal contempt proceedings on the ground that the applicable statute and rule providing for criminal contempt -- 18 U.S.C. § 401 and F.R. Cr. P. 42 -- are unconstitutional in that there are no specified limits placed upon the punishment which can be imposed. Although the parties have not cited any authorities discussing this precise argument, it is clear that the Supreme Court has long recognized the validity of the criminal contempt power granted by the statute and rule. Green v. United States, 356 U.S. 165 (1958); Frank v. United States, 395 U.S. 147 (1969).

For the foregoing reasons, defendants' motions are denied in all respects.

So ordered.

Dated: New York, New York
May 6, 1974

Thomas P. Griesa

THOMAS P. GRIESA
U.S.D.J.

MINUTES OF TRIAL

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

vs : 73 Cr. Ms. 25
73 Cr. Ms. 24

RICHARD HUSS and JEFFREY H. SMILOW, :

Defendants. :

- x

July 16, 1974,
10 A.M.

Before:

Hon. Thomas P. Griesa,
District Judge and a Jury.

Appearances:

Paul J. Curran, U.S. Attorney,
For the government,
By: Robert Cold, Assistant U.S. Attorney.

Paul G. Chevigny, Esq.,
For the defendants.

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(In the robing room.)

MR. CHEVIGNY: Mr. Gold has chosen from Exhibits A and B to the order to show cause some portions and I consented to his excisions much of which dealt with cutting out wiretap material.

THE COURT: We are late so what is that he wants to do that you object to?

MR. CHEVIGNY: He wants to cut out pages 140 through 148 which is chiefly an argument by Mr. Miller in which at the end of which the argument on page 144 Mr. Huss is asked by the court if that is the basis of his objection and Mr. Miller says that there is another ground and then on page 146 the witness is asked if that is the basis and --

THE COURT: Wait a minute now. Mr. Gold wants to cut out pages 140 through 148, right?

MR. CHEVIGNY: Right. And I would like to keep them.

THE COURT: Why do you want to keep them? It is all about this legal argument between Mr. Miller who was then representing Huss and Judge Bauman about the argument made by Mr. Miller about Jewish law and Mr. Miller states that there are two grounds of Jewish law alleged as grounds for objecting to testifying: one, that by testifying under a grant of immunity the witness has been granted a consideration or a reward for testifying against another Jew; secondly, that no

court of law can even decide what the witness' obligations are because only a Jewish religious authority can do it. Is that right, basically?

MR. CHEVIGNY: Yes.

THE COURT: And this is all discussed, and this has nothing to do it seems to me with the issues in our case. which is really whether Judge Bauman ordered Mr. Huss and Mr. Smilow to testify and whether they understood his order, or whether they were mistaken about the order for some reason and whether they consciously disobeyed it. I don't understand why we have to have eight pages of colloquy about Jewish religious law.

MR. CHEVIGNY: My point is --

THE COURT: Is there any part of that in which Judge Bauman directs an order to the defendant Huss?

MR. CHEVIGNY: At page 144 the reason that I would, that I seek to keep it is that the judge asks Mr. Huss if that is the basis of his objection, and he says it is, and the same thing occurs at 146 with relation to the second ground.

THE COURT: Those grounds are irrelevant to our case.

MR. CHEVIGNY: Well, as the issue here is intent, your Honor, it seems to me that the United States Attorney

has cut the case down or tried to cut the transcript down to the bare bones and as your Honor has ruled that the defendants can't testify as to their religious objection it seems to me that what's in the record with relation to their intent insofar as the religious defense affects their intent should be in.

THE COURT: I don't understand you. This gets to another point and that is the definition of knowingly and wilfully and I was going to get to that in a minute. But I would rule as a matter of law that Mr. Huss and Mr. Smilow have no defense whatever on the issue of intent or on any other issue based upon their private beliefs about alleged Jewish law. That is a question of law as to whether they can pose such a defense. Judge Bauman as a matter of law ruled on that. The Court of Appeals has ruled on that sufficiently clearly. I rule on it and I hold that as a matter of law these defendants have no defense whatever to this criminal contempt proceeding based on any theory or argument about Jewish law. It is irrelevant as a matter of law. It doesn't need to go to the jury in any form and so I would say that t he eight or so pages of colloquy, even including those statements by Mr, Huss, have no reason to come in so I will hold that the government can keep them out.

Is there anything else?

MR. CHEVIGNY: No. We are clear on everything else.

THE COURT: I would like to ask you -- and we will go into this a little later -- this question of how to charge the jury on the meaning of knowingly and wilfully has given me a little problem.

The government has done what the United States Attorney's office so often does: they give me a charge in the abstract taken from the needs and circumstances of a completely different case, and they offer it as the charge in this case with not the slightest effort to apply it to this case.

You have given me a definition of knowingly and wilfully, Mr. Gold, and you give me a cite to some ancient civil case which has nothing to do with criminal contempt, some one or two criminal cases which have nothing to do with criminal contempt.

I think you have got to, yourself, or in your office, at least go through the mental exercise of trying to draft a charge that applies to this case.

What are the issues in this case? This is not a bank robbery case, or a stock case, or some other kind of case, and I think that this kind of boilerplate charge, if it is boilerplate, or whatever it is that you have given me would be of no utility to the jury at all.

You say that an act is done knowingly if it is done voluntarily and purposely and not because of mistake, accident, mere negligence or other innocent reason. The jury might after those words say take on voluntary, was he acting voluntarily? Is that a helpful word to give the jury? Purposefully? Is that a helpful word in this case? He wasn't in there doing anything voluntarily. Purposely? His purpose was to carry out the dictates of Jewish law. Mistake? Is that a helpful word to give to the jury? The jury could easily say "Well, he mistakenly believed that he was entitled not to testify because some private motive or belief of his."

None of these words is going to help the jury solve our case. They may be helpful in a narcotics case or a bank robbery case but they are not helpful in this case.

I have the same problem with Mr, Chevigny's charge although a little different problem. You want me to charge that specific intent to violate the law is necessary. Now that's taken from the form book, and I think the language is in there but when you get into the annotations to that there is a different kind of case, and I can see what you want to accomplish. From my point of view that would mislead the jury. That would not be legally correct here because it would permit the jury to let the defendants off solely if they found that they had some or they lacked a purpose to violate

the law.

What I think both of you have got to figure out is what a proper charge is in this case. How do you instruct the jury in some sense I believe rational manner which will convey to them the precise issue they are supposed to decide in this case, and I would think frankly the question is simply, did the defendants understand Judge Bauman's order or orders, and did they consciously decide to obey, to disobey those orders? To me that's the beginning and the end of it. But before I charge I want from both of you a redraft of the charge applying to the issues in this case and telling the jury what are the specific, precise issues they will have to determine in this case, and Mr. Chevigny, you may disagree with my ruling on the law but within my rulings on the law I need to have a proposed charge from you to give to the jury. It doesn't waive your legal arguments about religious motives and so forth but I have got to have a helpful charge. All right, let's go out.

(In the courtroom. Jury present.)

THE COURT: Ladies and gentlemen, let me outline the course of the trial briefly.

The government, the Assistant United States Attorney, will make an opening statement and explain to you what it expects to prove.

The defense attorney is entitled to make an opening statement but he is not required to do so. The entire burden of proving the case and explaining the case is on the government.

I think that the defendant is not required to make an opening statement, defense counsel.

Now, whether the one statement or two statements are made, one point that you should remember is that those statements, like any argument of the lawyers or statements by the court, aren't evidence; they are arguments intended to help you understand what each side thinks the evidence shows or doesn't show, but the statements of the lawyers, the statements that I make as the judge, aren't evidence.

The evidence in this case will consist entirely or almost entirely of the transcripts of what happened before Judge Bauman. You will hear that and the written transcripts I assume will be available for you to read during your deliberations if you want to read those transcripts, but the evidence in this case will consist solely or almost entirely of the stenographic transcripts of the questions that were asked of Mr. Huss and Mr. Smilow in the criminal case before Judge Bauman, the responses to those questions by each defendant basically declining to answer, and the orders of Judge Bauman and the responses to those orders. You will hear all that.

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Anyway, that is the evidence.

The government will introduce its evidence in the form I have described to you, and at the conclusion of that evidence the defendants have a right to introduce evidence on their behalf but they are not required to do so.

At the conclusion of all the evidence, the attorneys will make their summations as to what they believe the the evidence has or has not proved.

Now, the law which applies to this case is what I will lay down by way of instructions and rulings during the course of the trial. There probably won't be many problems in the way of rulings on evidence. In a normal trial, as you know, there are usual objections at various times to the introduction of evidence. There is probably very little need for that here but to the extent that there is that's my job and you are not concerned with those rulings on matters of evidence and procedure.

At the conclusion of the trial and during the trial I will instruct you on the law at various times and it is your duty to follow those instructions and apply those instructions whether you personally may agree with them or not. That is your sworn job in this trial.

Now, as I think you already know from the questioning and the statements that have already been made, that the

only basis for deciding this case is the law and the evidence. You cannot be influenced in any degree by personal feeling, any inflamed feeling for or against any party, any sympathetic feeling for or against any party. You have got a duty to obey the law here and carry on the legal instructions and listen to the evidence. That is your sworn duty to do that. And if the trial was to be governed by emotion, prejudice, personal feelings of any kind, we wouldn't need to have a trial. We wouldn't need to have a court of law.

As I said to you yesterday, until this case is finally submitted after the evidence is in, and after I have instructed you on the law, and when you start your official deliberations, before that time you are to engage in no discussion whatever in any way about the case, the issues, the personalities, whether it is in the lunchroom, the hallway, the elevator or any other place. There is to be no informal piecemeal discussion in the case among yourselves or with anybody else, family or friends. I am confident the case will conclude today but if for any reason during the day or if it should go overnight, if you should see anything in the press, television or radio, or hear anything, you are to immediately avoid it.

All right. Mr. Gold, you may make your opening statement.

MR. GOLD: Your Honor, Miss Carey, Mr. Chevigny, madam forelady and ladies and gentlemen of the jury. As all of you now know this is a federal criminal case in which the defendants Richard Huss and Jeffrey Smilow who are seated right over here are each charged with criminal contempt of court for knowingly, wilfully, deliberately and understandingly refusing to obey an order issued by a federal judge in this court. That order required each of these defendants to testify as a government witness at a criminal trial held in this courthouse a little more than a year ago.

As Judge Griesa has already told you, my name is Robert Gold. I am an Assistant United States Attorney and I will be presenting to you the evidence in this case. Seated with me at counsel table is Robert Wittaker. He is a law student and he is working in the United States Attorney's office as a summer assistant.

The essential charge in this case is that a little more than a year ago the defendants were each called to testify at a criminal trial entitled United States of America v. Stuart Cohen and Sheldon Davis. And as his Honor has told you yesterday, that case arose from a fire bombing which occurred on January 26, 1972. That fire bombing occurred at the offices of Columbia Artists Management and Hurok Concerts Incorporated, both here in New York City.

Unfortunately a secretary by the name of Iris Cohen was killed in the explosion.

On June 8, 1973, at that trial, Richard Huss and Jeffrey Smilow were called to the witness stand and the clerk administered the oath. The government prosecutor, a Mr. Jaffe by name, put questions to each of the defendants concerning the facts of the fire bombing. Each defendant refused to answer.

Each of the defendants asserted his privilege against self-incrimination as the ground upon which he refused to answer.

Now what would he mean by asserting the privilege against self-incrimination. Very simply this: Each of the defendants refused to answer the questions put to him claiming that if he answered those questions his testimony would be damaging, it would tend to incriminate him and the government might be able to prosecute him on the basis of his testimony.

At that point in the trial, at the government's specific request -- Judge Bauman, who was presiding at the trial, granted each defendant what we call immunity. And what do we mean by the term immunity. There is nothing magical about the term. In plain everyday talk it means nothing more than this: once a judge gives a witness immunity, the

witness must testify, and the government is absolutely prevented from using anything that witness says against him in any respect whatsoever. It is an absolute guarantee that you cannot be prosecuted on the basis of anything you said.

And so, ladies and gentlemen, whether the defendants Huss and Smilow told Judge Bauman that they refused to answer the questions put to them on the ground that their answers might tend to incriminate them and lead to their prosecution, Judge Bauman gave them both immunity, an absolute guarantee that they couldn't be prosecuted on the basis of anything they said.

The evidence will show that even after Judge Bauman granted each defendant immunity, he then ordered each defendant to answer each and every question put to him concerning the facts of the fire bombing.

Nonetheless, the defendants each refused to answer. They refused to answer despite this grant of immunity and despite Judge Bauman's repeated orders to testify.

What happened then? Judge Bauman held each of the defendants in civil contempt. Civil contempt is very different from the charge before you this morning, which is criminal contempt.

Judge Bauman at that time carefully advised each of the defendants that if they continued to refuse to testify,

if they continued to deny his clear order to testify, each defendant would subject himself to prosecution for criminal contempt.

All of this occurred, you will recall, on June 8, 1973.

After they were held in civil contempt, each of these defendants took his case to a higher court, and in this case it was the United States Court of Appeals. On June 26, 1973, the United States Court of Appeals rendered its decision. It affirmed Judge Bauman's judgment of civil contempt against both of these defendants and held, in effect, that both of these defendants had no legal justification whatsoever for refusing to testify and to deny Judge Bauman's order.

The matter did not stop there.

THE COURT: Remember these are laymen. You used the term civil contempt. You better define it. If you don't, I will. What is meant by civil contempt. You better define it. If you don't, I will. What is meant by civil contempt. I think you better explain it.

MR. GOLD: I would be delighted to, your Honor.

Ladies and gentlemen, civil contempt is a remedy by which the court attempts to compel a defendant to comply with a court order. Whether a defendant or a witness is

held in civil contempt, in common language we say that the person held in civil contempt holds the keys to the courthouse, to the jail house. Any time he chooses to answer the questions put to him, he can immediately be released from custody, answer the questions and go free. That is very different from criminal contempt. Criminal contempt I will explain to you in a few minutes works very differently.

Now after the Court of Appeals rendered its decision on June 26, 1973, the following day both of these defendants were recalled to the stand. They were given another chance to comply with Judge Bauman's order.

However, as the evidence will show this morning, neither defendant changed his position. They both continued to refuse to testify. Judge Bauman gave them very careful warnings that if they continued to defy his order to testify, they would then subject themselves to criminal contempt of court.

What was the result of Judge Bauman's warnings? You will hear this morning absolutely nothing. Both of these defendants refused to testify.

At that point the government prosecutors told Judge Bauman that without Mr. Huss and Mr. Smilow as witnesses the government couldn't proceeed with the fire bombing trial and, in fact, the trial was terminated. And

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both Mr. Huss and Mr. Smiley are on trial before you this morning.

Now, in the course of that trial we will prove to you that Mr. Huss and Mr. Smilow knowingly and wilfully refused time and time and time again to obey Judge Bauman's very carefullyworded order and to listen to his very carefully worded warnings.

The way we are going to do that is this: we are going to offer in evidence the actual stenographic transcript from that trial, and through the assistance of a witness we are going to read together the exact words that were spoken at that trial. You will hear the very words that were spoken by Judge Bauman, by each of these defendants, by the prosecutors and in some instances by the defense lawyers.

That in a nutshell is the government's case. As you can see, it is a relatively simple and straightforward case. But that doesn't mean for one minute that it is not a terribly important case. It is obviously terribly important to each of these defendants who are charged with a terribly serious federal crime. It is equally important to the government whose responsibility it is to enforce the laws enacted by Congress and to attempt to maintain the integrity of our court system.

Accordingly I urge you to give this case your very

careful consideration. I trust that if you do that and follow his Honor's instructions on the law, at the end of the case, when all of the evidence is in, you will find both defendants guilty as charged.

Thank you.

THE COURT: Mr. Chevigny, as I understand it you are going to waive your opening, is that right?

MR. CHEVIGNY: Yes, your Honor.

THE COURT: Could I see counsel up here for just a minute, please.

(At the side bar.)

THE COURT: I permitted you to exclude the colloquy about the religious ground but I would assume that other parts of the material that is in that it does appear that there were religious objections made.

MR. GOLD: That's correct.

THE COURT: Well, it seems to me that you didn't-- I think that it is a little confusing to the jury at best and I think that you better tell them or else I can do it right now, that certain grounds -- it is such a naked kind of presentation at this point and the jury is going to hear all this about the religious grounds and they are going to wonder what the positions are about it and I will give you at least the opportunity to explain what your position is on

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that if you want to do it so that the jury knows what is coming.

MR. GOLD: Did your Honor offer a moment ago to do that? If your Honor is going to do that--

THE COURT: I think this is your job.

MR. GOLD: I would be delighted to.

MR. CHEVIGNY: I respectfully except. His position on the law is an opening for what he intends to prove. He doesn't intend to prove anything about a religious defense. Therefore I would except. I don't think it is a proper opening.

THE COURT: But the way he has presented it is simply that there was just an order by Judge Bauman and a naked refusal. Now, the jury has got to listen to this and they are going to hear about religious objections, and double jeopardy objections and so forth. The only one he touched on is the constitutional privilege against self-incrimination objection. I am not trying to do the government's case for it but I just don't want this jury to sit around and get confused needlessly, and it seems to me that I would be perfectly glad to give the government the opportunity to simply give the jury a forecast of the problems coming up fully and say what the government's position is on that and they will get the legal instruction at the end. You can amplify it.

MR. GOLD: I don't mean to put questions to the court but I want to make sure that ends the thrust of your Honor's direction. I would be delighted to do that but I want to make sure I do with the full understanding. I was confident that when we read from the transcripts responsively through my first witness it would become clear that each time a ground for refusal was raised by these defendants Judge Bauman explained that that was not a valid ground. I was concerned that had I put that in my opening the jury would be led to believe that that was the government's claim, that that was not a valid ground as opposed.

THE COURT: All right. Why don't you?

MR. GOLD: I didn't mean to confuse the jury. I am sorry if your Honor feels that I have.

THE COURT: Nobody means to confuse the jury. If you feel that's the better course as far as the government's case is concerned, why don't you let it rest there.

MR. GOLD: I would like to, your Honor. I am hopeful that if your Honor feels we have to clear it up I can do so on summation.

THE COURT: All right. Thank you.

(In open court.)

MR. GOLD: Your Honor, at this time the government would offer in evidence a stipulation entered into between

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counsel for the defense and counsel for the government. It's been previously marked Government's Exhibit 5.

MR. CHEVIGNY: No objection.

THE COURT: All right, Government's Exhibit 5 is received.

(Government's Exhibit 5 received in evidence.)

MR. GOLD: With your Honor's permission I would like to read it to the jury.

THE COURT: You may.

MR. GOLD: Government's Exhibit 5 reads as follows:

"It is hereby stipulated and agreed by and between defendants Richard Huss and Jeffrey Smilow by their attorney Paul Chevigny, Esq. and the United States of America by its counsel, Paul J. Curran, the United States Attorney for the Southern District of New York, Robert Gold, Assistant United States Attorney of counsel, that if called as a witness at the trial herein, the appropriate court reporter on the staff of the Southern District Court Reporters would testify essentially as follows:

"1. That he was the court reporter who prepared the stenographic minutes during the trial of United States v. Stuart Cohen and Sheldon Davis, 73 Cr. 778 which commenced in this courthouse on May 30, 1973, and terminated on or

about June 27, 1973.

"2. That he has examined the transcript of the stenographic minutes taken during the course of the said trial.

"3. That Government's Exhibit 1, 1A, 1B, 1C and 1D are accurate copies of portions of the stenographic transcript of the testimony given by Richard Huss on or about June 8, 1973.

"4. That Government's Exhibits 2A, 2B, and 2C are accurate copies of portions of the stenographic transcript of the testimony given by Jeffrey Smilow on or about June 8, 1973.

"5. That Government's Exhibit 3 is an accurate copy of a portion of the stenographic transcript of testimony given by Richard Huss on or about June 27, 1973.

"6. That Government's Exhibits 4A and 4B are accurate copies of portions of the stenographic transcript of testimony given by Jeffrey Smilow on or about June 27, 1973."

Dated New York, New York, July 15, 1974.

Your Honor, at this time we would offer the transcripts referred to in the stipulation. Mr. Chevigny has a copy as does the court.

THE COURT: All right.

MR. GOLD: At this time the government offers Government's Exhibits 1, 1A, 1B, 1C, 1D, 2A, 2B, 2C, 3, 4A and 4B.

THE COURT: 1, 1A, 1B, 1C and 1D, and 2A, 2B and 2C.

MR. GOLD: Yes, your Honor.

THE COURT: 2A, 2B, 2C.

MR. GOLD: That's correct. 3, 4A and 4B.

THE COURT: Received.

(Government's Exhibits 1, 1A, 1B, 1C, 1D, 2A, 2B, 2C, 3, 4A and 4B received in evidence.)

THE COURT: I take it there was no objection.

MR. CHEVIGNY: No objection.

THE COURT: All right.

MR. GOLD: Your Honor, at this time the government calls its first witness, John Gross.

J O H N G R O S S, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLD:

Q Mr. Gross, would you tell us how you are employed, please?

A I am an Assistant United States Attorney in this

district.

Q Did you have any connection whatsoever with the trial of United States against Stuart Cohen and Sheldon Seigel in the summer of 1973?

A No, sir.

Q Mr. Gross, I am now placing before you certain stenographic transcripts that have been received in evidence and I ask you to be good enough to read with me, and I ask you specifically to read the part of the witnesses Richard Huss and Jeffrey Smilow as the case may be.

MR. GOLD: Your Honor, I am beginning to read from Government's Exhibit 1 which reads as follows:

"United States of America v. Stuart Cohen, Sheldon Davis and Sheldon Seigel before the Honorable Arnold Bauman, District Judge, New York, June 8, 1973, 10:30 A.M. Trial resumed." Mr. Jaffe recalls Mr. Huss.

MR. GOLD: That's correct, your Honor.

THE COURT: Representing the government in that criminal action. Okay.

MR. GOLD: Now reading from Government's Exhibit 1A beginning at line 23:

"Richard Huss called as a witness by the government duly affirmed by the clerk of the court, testified as follows:" Reading from Government's Exhibit 1B. Commencing

at line 4.

"Direct Examination By Mr. Jaffe:

"Q Would you state and spell your name, please?

"A Richard Huss.

"Q Will you tell us where you live?

"A 5 Staten Island Boulevard.

"Q Would you tell us your age?

"A I decline to answer this series of questions on the ground that my testimony may tend to incriminate me. Also, it is my understanding of the Jewish law that I am prohibited from testifying against another Jew in a non-Jewish tribunal and on the grounds that any contrary interpretation of Jewish law made binding on me is itself a further violation of basic Jewish law.

"Mr. Jaffe: Your Honor, at this time we would hand up to the court an application we attempted to file last week with regard to immunity from Mr. Huss. I will hand a copy of that application to Mr. Miller and I will hand to the court a letter, the original of a letter from Henry E. Peterson, Assistant Attorney General, authorizing the United States Attorney to make that application."

Now reading from Government's Exhibit 1C at line 15 by Mr. Jaffe:

"Q Mr. Huss, directing your attention to January 26,

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1972, specifically to the morning of that day, did you see the defendants Stuart Cohen and Sheldon Davis on that day?

"The Court: Before you answer that question, Mr. Huss, I want to explain to you that I have just signed an order which confers immunity on you and which prevents the use of anything you say against you. I am going to give you a moment or as much time as you like, Mr. Huss, to talk to your lawyer so that he can explain to you the legal significance of what I have done in signing this order I have just signed. You may step down.

"Mr. Jaffe: Your Honor, before the witness steps down, would the court also admonish the witness that it is the court's opinion that the other basis stated for refusal to answer, specifically the religious grounds, is not a valid basis and that he consult about that.

"The Court: Yes, Mr. Huss. Your lawyer knows the case of United States v. Smilow, I have no doubt, but another judge of this court has ruled upon the same objection in that case of Mr. Smilow and has held it to be not a valid ground for refusal to answer. The substance of what I have said is that I agree with the ruling of that judge, Judge Weinfeld by name. With respect to the claim based upon religious scruples and advise you that it is not a proper

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basis on which you may refuse to answer."

Now reading from Government's Exhibit 1D.

"The Court: The objection based on religious grounds is overruled.

"Mr. Miller: I except."

THE COURT: You haven't said who Mr. Miller is.

MR. GOLD: Mr. Miller is one of the defense lawyers.

THE COURT: Who was representing Mr. Huss at that time, was he not?

MR. GOLD: Yes.

THE COURT: Again, Mr. Jaffe was the government lawyer, Mr. Miller was representing Mr. Huss at that time, and when it says the court, when the stenographer takes down these minutes at trials, when the judge is speaking they say the court, and that meant Judge Bauman. Okay.

MR. GOLD: Commencing reading at line 5.

"The Court: I would like you to talk to your client, please, and explain to him-- You may step down, Mr. Huss-- the significance of the order I have just signed.

"Mr. Jaffe: Shall we proceed with Mr. Smilow?

"The Court: We will take a five-minute recess because I want counsel to have an opportunity to talk to his client.

"(Recess.)"

Commencing at line 18, examination by Mr. Jaffe.

"Q Mr. Huss, directing your attention to the morning of January 26, 1972, did you see Sheldon Davis on that morning?

"A I respectfully decline to answer this series of questions on the grounds that it is my understanding of Jewish law I am prohibited from testifying against another Jew in a non-Jewish tribunal and on the grounds that any contrary interpretation of Jewish law made against me is a further violation of the Jewish law.

"The Court: Do you understand I have overruled that objection.

"The Witness: Yes, your Honor.

"The Court: All right.

"By Mr. Jaffe:

"Q Mr. Huss, on the morning of January 26, 1972, did you drive in a car with Sheldon Davis and other people from Brooklyn into Manhattan?

"A I respectfully decline to answer.

"The Court: You may say same declination.

"The Witness: Yes, your Honor.

"The Court: You decline to answer on the same ground.

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"The Witness: Yes, sir.

"Mr. Jaffe: Would you order the witness to answer that?

"The Court: I order you to answer the question, Mr. Witness.

"The Witness: Same declination.

"Q Mr. Huss, on the morning of January 26, 1972, did you have a discussion with Mr. Davis and other individuals concerning the placement of an attache case at the premises of either Hurok Concerts Incorporated or Columbia Management Artists Incorporated?

"Mr. Slotnick: I object to it if the Court please.

"The Court: Overruled. You may answer.

"The Witness: Same declination.

"The Court: I order you to answer.

"The Witness: Same declination."

THE COURT: When he says same declination it simply means that he declines to answer for the reasons previously given.

"Mr. Gold: Question by Mr. Jaffe.

"Q Mr. Huss, on the morning of January 26, 1972, did you go with an individual named Jerome traut also known as Jerry Celler, to the offices of Hurok Concerts and

there place an attache case and ignite it?

"The Court: Go ahead.

"Q Would you answer that question, Mr. Huss?

"A Same declination.

"The Court: I order you to answer, Mr. Huss.

"The Witness: Same declination.

"Q Were you at any time on the morning of January 26, 1972, in the company of Sheldon Davis, Jerome Zellerkraut, also known as Jerry Celler, and an individual named Murray Elbogen?

"A Same declination.

"The Court: Overruled. You may answer.

"A Same declination.

"The Court: I order you to answer, Mr. Huss.

"A Same declination.

"Q Mr. Huss, prior to January 26, 1972 -- within a period of time from about two weeks before that date, that is, from two weeks before January 26, 1972, through January 26, 1972, did you have any discussions with Sheldon Davis or Stuart Cohen or with the indivudals Murray Elbogen, Jeffrey Smilow or Jerome Zellerkraut concerning placement of any attache cases or incendiary devises at either Hurok Concerts Incorporated or Columbia Artists Management?

"The Court: I understand that. I don't regard this as a charade at all. He is asking questions that bear on the allegations of the indictment. The witness has consistently refused to answer and is heading in the direction of a contempt and I shall deal with that at the appropriate time."

Continuing on line 9 of the next page.

"The Court: You may answer.

"A Same declination.

"The Court: I order you to answer.

"A Same declination.

"The Court: I don't really see much point in going on.

"Mr. Jaffe: We were going to inquire whether it was his intention to give the same declination if other questions were put to the witness.

"The Court: You may answer that.

"A Yes.

"Mr. Jaffe: At this time we would ask that the court make the finding that Mr. Huss is in contempt of this court and ask that he be remanded to the custody of the Attorney General until such time during this proceeding that he be recalled and give testimony before this court.

"The Court: Before you say anything, I will hear

you, of course, Mr. Huss. I find you in contempt of this court. There are two kinds of contempt that I want to tell you about. One is civil contempt which provides for your incarceration during the course of this proceeding but leaves the keys to the prison with you in that if you decide to answer at any time, you will be released.

The second kind of contempt is a criminal contempt which does not look for answer but is meant as punishment for your contemptuous conduct in refusing ro answer questions. I instruct you, sir, that a civil contempt does not exclude criminal contempt. I find the witness in contempt of court.

Your Honor, I am now going to begin reading from Government's Exhibit 2A. At line 21, Jeffrey Smilow, called as a witness by the government, being affirmed, testified as follows: reading from Government's Exhibit 2A at line 12.

"Direct Examination

By Mr. Jaffe:

"Q Mr. Smilow, would you tell us your age, sir?"

THE COURT: This was the June 8, 1973, trial?

MR. GOLD: That's right.

THE COURT: The same date as the material you read just now?

MR. GOLD: That's correct, your Honor.

THE COURT: Okay.

"Q Mr. Smilow, would you tell us your age, sir?

"A 18.

"Q I don't hear you.

"A 18.

"The Court: He said 18."

Line 5 of the next page by Mr. Jaffe.

"Q Mr. Smilow, directing your attention to January 26, 1972, did you, on that day, during the morning, see Sheldon Davis or Stuart Cohen?

"A I refuse to answer on the ground that to require me to respond to the question would violate my constitutional right of freedom of worship as a committed and observant Jew under the First Amendment to the Constitution and that to compel me to answer said question would violate my right of freedom of worship as a committed and observant Jew in that under traditional Jewish law I didn't testify in any case where I am to receive an advantage or benefit because of my testimony against individuals. I refuse to answer the question on the ground that I presently am charged with committing on January 26, 1972, at about 9:25 A.M. at 165 West 57th Street, New York, a crime of arson. I refuse to answer on the ground that to require me to respond to the question would violate my right to remain silent."

My copy is not clear here, Mr. Gold.

I will go back about a half a line about the court's permission.

"I refuse to answer on the ground that to require me to respond to the question would violate my right to remain silent which is guaranteed under the First Amendment of the United States Constitution.

"I respectfully refuse to testify against myself. I further refuse to testify on the basis that the government obtained information illegally by allowing the co-defendant to act as an informant and to participate in taped conversations with me.

I further respectfully refuse to answer on the basis that I have already been put in jeopardy for the same proceeding and I have been already punished although that proceeding was dismissed.

"MR. GOLD: With regard to the witness [illegible] refusal to testify against himself, the government in its application to grant immunity to the witness.

" We hand up to the court the original application and copies of the originalletters and we hand a copy of the immunity application to his attorney, Mr. Slotnick, one of the defense attorneys.

"MR. SLOTNICK: May defense have a copy of that, your Honor?

"MR. JAFFE: I will hand a copy to defense counsel so they both may take a look at that, your Honor.

"MR. SLOTNICK: Thank you, Mr. Jaffe."

THE COURT: There is a blank in the date of filing in the order.

"MR. JAFFE: That was originally filed on the 31st. "

" THE COURT: Are the original exhibits legible? My copy has some lines missing and apparently Mr. Gross' copy does. Now, if given to the jury it's got to be legible.

MR. GOLD: I will see to it that the copy given to the jury is legible.

THE COURT: All right.

MR. GOLD: "THE COURT: On May 31st.

"MR. JAFFE: That's correct.

"THE COURT: Mr. Smilow, I have just signed an order that confers upon you immunity against the use of anything that you are required to testify to in this courtroom. Do you understand that?

"THE WITNESS: I understand.

"THE COURT: Do you want a reasonable time to talk to your lawyer about the significance of the order I have just signed?

"THE WITNESS: No.

"THE COURT: The witness says no. Go ahead.

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"MR. SLOTNICK: Your Honor, for the record, my silence should not be an indication of approval other than I am just constrained to act under your Honor's prior ruling.

"THE COURT: I understand. Yes. You have a continuing objection to these proceedings, both of you.

"MR. JAFFE: Your Honor, with regard to the other basis raised by the witness with regard to his religious objection, the religious objection is almost in haec verba. The statement he made before the grand jury which was subsequently made before Jude Weinfeld and determined to be insufficient. Affirmed by the Second Circuit in the first Smilow case by Judge Feinberg and we would ask the court to instruct the witness with regard to his religious bases that in fact he has no religious basis on which he may decline to answer questions under the First Amendment.

"THE COURT: Yes. You understand that so far as your assertion of a privilege, whether it be constitutionally based or religiously based, I do not find that that is an appropriate reason for refusing to answer proper questions, and I should direct you to answer such questions as I deem proper."

Continuing at line 23.

"THE COURT: I think the record should indicate that I addressed to the witness a statement that immunity

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has been pursuant to the authorities set forth in Title 18, United States Code, Section 6003.

"MR. JAFFE: With regard to his other basis for refusing to testify.

"THE COURT: Just a moment. 6002 is the order that I made. In any event, you understand that now immunity has been conferred upon you, do you not?

"THE WITNESS: Yes.

"MR. JAFFE: With regard to his other basis, your Honor, the witness refuses to answer based on two assertions: One, that he has been placed in double jeopardy in that on a previous occasion he was held in contempt for refusing to testify. We ask the court to instruct him that that is an insufficient basis for refusing to now testify before a hearing held in front of the court.

"THE COURT: I so instruct the witness.

"MR. JAFFE: With regard to his refusal to answer based on the discovery of this witness by the existence of tapes which led to the discovery of the witness Sheldon Seigel, we would ask the court to instruct him that that too is no basis on which he may refuse to testify.

"THE COURT: Yes. The witness is so instructed."

Examination by Mr. Jaffe at line 23.

"Q Mr. Smilow, directing your attention to January 26,

1972, did you on that date meet with Sheldon Davis and with Murray Elbogen, Jerome Zellerkraut and Richard Huss.

"THE COURT: You need not read the entire thing Mr. Smilow. You may say same declination if that is what you want to do.

"THE WITNESS: Same declination.

"MR. PUTZEL: I didn't hear the answer.

"THE COURT: He said same declination.

"MR. JAFFE: Would the court direct the witness to answer that question.

"THE COURT: I order you to answer that question.

"THE WITNESS: Same declination."

Question by Mr. Jaffe.

"Q Mr. Smilow, when did you, prior to January 26, 1972, have any conversations with Stuart Cohen or Sheldon Davis concerning your agreement with them to take an attache case to the premises of Columbia Artists Management Incorporated, to there ignite a fuse contained in that attache case and in fact on the 26th --

"THE COURT: Mr. Jaffe, don't tell a story. Just read a lawyerlike question please.

"MR. JAFFE: Let me withdraw the question.

"Q Prior to January 26, 1972, did you have a conversation or conversations with Sheldon Davis and with

Stuart Cohen concerning your involvement in going to Columbia Artists Management?

"A Same declination.

"THE COURT: I order you to answer, sir.

"THE WITNESS: Same declination."

Question by Mr. Jaffe.

"Q As a result of that conversation or any conversations, did you, on the 26th of January, 1972, go with certain individuals in a car from Brooklyn to Manhattan?

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same.

"Q Did you on the 26th of January, 1972, go with an individual to the premises of Columbia Artists Management?

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"THE COURT: I think that is enough, Mr. Jaffe. Why don't you ask him one question to the effect as to whether or not he intends to decline on those grounds."

Now reading from Government's Exhibit 2C at line 5. Question by Mr. Jaffe.

"Q Directing your attention to the month of June, 1972, Mr. Smilow, did you have any conversations with Sheldon

Seigel?

"A Same declination.

"THE COURT: What did you say?

"THE WITNESS: Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination."

Question by Mr. Jaffe.

"Q Mr. Smilow, is it your intention that to any other questions that I put to you, that you will give the same declination and refuse to answer?

"MR. SLOTNICK: I object to that, your Honor, as not being part of the proceedings.

"THE COURT: Overruled.

"Q Sir?

"THE COURT: Answer it. You decline to answer whether you will continue to answer.

"THE WITNESS: I will answer the same way.

"THE COURT: You will answer thesame way? All right.

"MR. JAFFE: At this time,your Honor,the government would ask the court under Title 28, Section 1826(a) to find that this witness is in contempt of court and the government's application is that the court order he be remanded to the custody of the Attorney General for the duration of this

proceeding until such time as he gives testimony before this court.

"THE COURT: Mr. Smilow, I want to explain something to you: I am about to hold you in civil contempt. That means that I am going to order that you be placed in the custody of the Attorney General for the duration of the trial unless in the interim, in the meanwhile you indicate your willingness to answer the questions you have declined to answer today. Do you understand?

"THE WITNESS: My copy is not altogether clear here that it appears--

"THE COURT: Let's get him a clear copy, please.

"MR. PUTZEL: I am doing the best I can. We are all working with Xeroxes.

"THE WITNESS: I understand.

"THE COURT: That is civil contempt and the purpose of civil contempt is to induce you to break your silence. There is another kind of contempt which is called criminal contempt which has as its purpose punishment for the crime of contempt. The two aren't exclusive. Do you understand what I have just told you?

"THE WITNESS: Yes.

"THE COURT: All right, Mr. Smilow. The court finds you in civil contempt and it is the order of the court

that you be committed to the custody of the Attorney General for the duration of the trial or until such time as you answer the questions which you have declined to answer today."

Your Honor, nowreading from Government's Exhibit 3 which is the transcript of proceedings of June 27, 1973.

THE COURT: All right. Give me just a minute here. I am going backwards.

(Pause)

THE COURT: All right. Go ahead.

MR. GOLD: At page 249. Richard Huss, having been duly affirmed.

THE COURT: What is the date of this?

MR. GOLD: June 27, 1973.

THE COURT: This relates now to the questioning of Mr. Huss on June 27th? You are now going to read proceedings about Mr. Huss that took place some 20 days later.

MR. GOLD: That's correct.

THE COURT: And that is June 27th?

MR. GOLD: That's correct.

"Richard Huss having been duly affirmed, testified as follows. Direct examination by Mr. Jaffe.

"Q Mr. Huss, do you know an individual named Sheldon Davis?

"A The Court of Appeals has ruled that my prior

refusal to answer questions in this proceeding on the grounds that to answer any questions would be a severe violation of the teachings of my religion and cannot be recognized by an American court as the basis for not testifying. With all duerespect to the decision of the Court of Appeals, and of the honorable tribunal, I find that the cardinal precepts of my religion must take precedence in my mind. Therefore I respectfully decline to answer any questions on the religious principles stated in my prior declinations before this honorable tribunal.

"THE COURT: I direct you to answer. I order you to answer.

"THE WITNESS: Same declination.

"MR. JAFFE: Excuse me just a minute, Judge.

"THE COURT: Before this goes any further, Mr. Huss, I want to tell you something: I explained the last time that your failure to answer questions when I have ordered you to answer constituted contempt of court. I told you that my having committed you for civil contempt does not preclude the bringing of charges of criminal contempt against you. I again want to advise you of that and I want to make other things abundantly clear to you, Mr. Huss: One. I am going to ask the United States Attorney to comply with the provisions of Rule 42(b) and proceed against you for criminal

contempt if you persist in your refusal to answer. I, for one, regard your refusal to answer as criminal contempt. I want further to advise you, Mr. Huss, that for criminal contempt there is no limit upon the amount of punishment which can be imposed upon you for that crime. Is that clear?

"THE WITNESS: Yes, your Honor."

Question by Mr. Jaffe.

"Q Mr. Huss, do you know an individual named Stuart Cohen?

"A Same declination.

"MR. JAFFE: Would your Honor direct the witness.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination."

Question by Mr. Jaffe.

"Q Do you know an individual named Murray Elbogen?

"A Same declination.

"THE COURT: I order you to answer.

"A Same declination.

"Q Do you know an individual named Jeffrey Smilow?

"A Same declination.

"THE COURT: I order you to answer.

"A Same declination.

"Q Do you know an individual named Sheldon Seigel?

"A Same declination.

"THE COURT: I order you to answer.

"A Same.

"Q Do you know an individual named Jerry Cellerkraut?

"MR. ZWEIBON: Your Honor, I think we have gone--

"THE COURT: I don't think so. Go ahead.

"Q Do you know an individual named Jerome Cellerkraut?

"A Same declination.

"THE COURT: I order you to answer.

"A Same declination.

"Q Directing your attention to the 25th of January, 1972, did you see Sheldon Davis, Stuart Cohen, Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Cellerkraut?

"A Same declination.

"THE COURT: I order you to answer.

"A Same declination.

"Q Directing your attention to the 26th of January, 1972, did you see Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Cellerkraut?

"A Same declination.

"THE COURT: I want to again advise you that your refusal to answer these questions over my order constitutes in my view criminal contempt of court and I want you to have that in mind. I now order you to answer.

"THE WITNESS: Same declination.

"Q Directing your attention, Mr. Huss, to the morning of January 26, 1972, would you tell the court who you saw, that is, what persons you saw on that morning?

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"MR. MILLER: Excuse me, your Honor. The witness has made it clear in my mind that he will not answer. I see no purpose in this continuing.

"THE COURT: Let me tell you what the purpose is: someone has committed a dastardly, vicious, unforgivable, unforgettable crime. Someone is frustrating the administration of justice in a case that in my mind involves murder. People who deliberately do so will learn the power of the law even if there are those who have literally gotten away with murder. Proceed."

Question by Mr. Jaffe.

"Q Mr. Huss, on the morning of January 26, 1972, did you go in a motor vehicle with Sheldon Davis, with Jeffrey Smilow and Murray Elbogen and with Jerome Cellerkraut and drive in an automobile from Brooklyn to Manhattan?

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"Q Had you, prior to the morning of January 26, 1972, agreed with Sheldon Davis and Stuart Cohen that you and Jerome Zellerkraut would go to the offices of Sol Hurok?

"A Same declination.

"MR SLOTNICK: I object to the form of the question.

"THE COURT: Overruled. Same order. I order you to answer.

"THE WITNESS: Same declination.

"Q Mr. Huss, did you, on the morning of January 26, deliver any attache case along with Jerome Zellerkraut to the offices of Sol Hurok?

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"THE COURT: I again advise you that your continued refusal to answer these questions over my direction constitutes criminal contempt of court. Go ahead.

"Q Mr. Huss, prior to the morning of January 26, 1972, or on the morning of January 26, 1972, did you have any discussions with Sheldon Davis, Stuart Cohen, Sheldon Seigal, Jerome Zellerkraut, Murray Elbogen, or Jeffrey Smiley about carrying an attache case to the offices of Hurok Concerts Incorporated?

"MR. SLOTNICK: I object to the form of the question.

"THE COURT: Overruled. Answer please.

"THE WITNESS: Same declination.

"THE COURT: I direct you to answer.

"THE WITNESS: Same declination.

"Q Mr. Huss, were you ever part of any plan to deliver any incendiary devices to either Hurok Concerts Incorporated or Columbia Artists Management on the morning of January 26, 1972?

"MR. SLOTNICK: I object to the form of the question.

"THE COURT: Overruled.

"THE WITNESS: Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"MR. JAFFE: Your Honor, may I have a moment?

"THE COURT: Yes. I want the record to indicate at this point that immunity has been conferred upon this individual previously. Are you aware of that, Mr. Huss?

"THE WITNESS: Yes.

"THE COURT: And you have been aware of that all morning, have you not?

"THE WITNESS: Yes, your Honor.

"Q Mr. Huss, on the morning of January 26, 1972, did you leave an incendiary device contained in a black attache case in the offices of Sol Hurok Concerts Incorporated?

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"Q Mr. Huss, on the morning of January 26, 1972, at around 9:30, did you meet in Manhattan with Jerome Zellerkraut, Jeffrey Smilow and Murray Elbogen?

"MR. SLOTNICK: I object to the form of the question. Is not binding on my client.

"THE COURT: Overruled.

"MR. ZWEIBON: Same objection.

"THE COURT: Overruled.

"A Same declination.

"THE COURT: I order you to answer.

"THE WITNESS: Same declination.

"MR. JAFFE: At this time the government would ask the court pursuant to Rule 42(b) to orally notify this witness that he is to be held in criminal contempt pursuant to Rule 42(b) in Sections 401 and 402 of Title 18, United States Code. We would state to the court that we are at this time ready to proceed forthwith with a trial for

criminal contempt of the witness Richard Huss.

"THE COURT: I want to tell you, Mr. Huss, as I have throughout your examination this morning, that your failure to answer the questions put to you constitutes in my judgment criminal contempt. However, so far as the United States Attorney is concerned, because of the seriousness of this criminal contempt, I think that the United States Attorney should proceed on papers as indicated in Rule 42(b), namely, that part "or on application of the United States Attorney by an order to show cause or an order of arrest."

You have made the application and since you make the application, I ask you to comply with Rule 42(b) and proceed by order to show cause or an order of arrest so that the order to show cause, to be perfectly frank with you, will specify in writing for this man what he is facing. Obviously this proceeding will be a jury proceeding.

"MR. JAFFE: That's correct.

"THE COURT: Because it is inconceivable to me that anybody would be thinking of proceeding in a manner that would limit punishment if this man is guilty to six months, and therefore I want every letter observed. I want him proceeded against in writing, I want the case to proceed to a jury trial, and I want the judge, whoever he is, to

have in mind my views as I have expressed it and previously this morning of the seriousness with which I view the frustration of a murder prosecution. People may do that but the law will make them pay.

"MR. JAFFE: Your Honor, with regard to Rule 42(b), the government would ask that, and we will comply with your Honor's direction to proceed on papers but the government would ask that since under Rule 42(b) notice can be given orally by the judge in open court in the presence of the defendant, and he will be a defendant, being cited for criminal contempt. I have so notified him it seems to me several times. If he has misunderstood me, I so notify him now. You will be a defendant in a criminal contempt proceeding, that is clear, isn't it, Mr. Huss?

"THE WITNESS: Yes, it is."

Your Honor, now reading from Government's Exhibit 4A, just the testimony of Jeffrey Smilow, also on June 27, 1973."Jeffrey Smilow, called as a witness in behalf of the government, was duly affirmed and testified as follows:" Line 4.

"THE COURT: Let me ask you, Mr. Smilow, are you prepared to answer the questions which you refused to answer at the last session?

"THE WITNESS: No. I decline to do so.

"THE COURT: I am not even going to ask him anything today other than the fact that he would persist in his refusals to answer. Beyond that I think the record is sufficient to proceed against him as I warned him the last time for criminal contempt and the United States Attorney advises me that he is going to do it based on the record the last time at which you made no such request. Then, if you want to take it up with the trial judge, whoever he may be, in his criminal contempt case, that may be the place to do it, but for now I believe, and I advise you, sir, that your failure to answer questions which you are now looking at, at the last session which you were called upon to testify constitutes criminal contempt of court and that the punishment for criminal contempt is without limit, is that clear?

"THE WITNESS: Yes.

"MR. LEIGHTON: Is your Honor going to allow the United States Government to ask of Mr. Smilow questions concerning this record?

"THE COURT: No. The record is clear.

"MR. PUTZEL: I think the record is perfectly clear and I think Mr. Smilow has answered that he persists in his contemptuous refusal to answer questions and accordingly, pursuant to Rule 42(b) of the Federal Rules of

Criminal Procedure, we will move this court through an order to show cause on papers to have Mr. Smilow cited for criminal contempt. I would ask the court to inquire of Mr. Smilow whether he was in court just previous to this during the time when Mr. Huss was advised by the court of the consequences of his refusal to testify.

"THE COURT: Were you here when I dealt with Mr. Huss a few moments ago? Were you in the courtroom?

"THE WITNESS: Yes.

"THE COURT: You heard the entire --

"THE WITNESS: Yes.

"THE COURT: Such as all the questions and everything I said to Mr. Huss?

"THE WITNESS: Yes.

"THE COURT: All right."

Thank you, Mr. Gross. I have no further questions.

THE COURT: No cross, Mr. Chevigny?

MR. CHEVIGNEY: No, your Honor.

THE COURT: You may be excused.

(Witness excused.)

MR.GOLD: Your Honor, at this time the government rests.

THE COURT: We will take a short recess at this point and I will see counsel in the robing room.

(The jury left the courtroom.)

(In the robing room.)

THE COURT: I just wanted to confer out of the presence of the jury motions or applications you had and see what you intend to do as far as putting in a case.

MR. CHEVIGNY: I would make a motion for acquittal here of course on the grounds that the government hasn't made a sufficient case against the defendants with relation to intent but I recognize--

THE COURT: You are making motions for the record on behalf of both defendants?

MR. CHEVIGNY: Yes.

THE COURT: Those motions are denied. What do you plan to do as far as your case?

MR. CHEVIGNY: I am going to put on Mr. Huss. I am going to ask him to testify as to what happened in the summer of 1972 with relation to certain members of the Jewish Defense League coming to see him. outside of the State of New York and then I am going to ask him to testify with relation to his religious conviction and I recognize or make an offer of proof with relation to that and I recognize that your Honor will exclude it.

THE COURT: Well, I am clear that I would refuse to let him testify on the religious objections, that the

question of religion is plainly irrelevant. Now let me hear about -- I don't mean -- I am not trying to get you to disclose your case in advance and normally I wouldn't.

MR. CHEVIGNY: I don't have any objection to it in this case actually.

THE COURT: But I think we have a situation here, which requires it if you don't mind. What would his testimony be about, the transactions in the summer?

MR. CHEVIGNY: Essentially certain persons came to see him and said that they were looking for an informer, or they suspected that there was an informer in the group. He was one of those who was suspected, and that he should watch out that there might be persons who would be looking for him. And then I will ask him what his reaction to it was.

THE COURT: Is he ready to name those people?

MR. CHEVIGNY: Yes, he is ready to name them.

THE COURT: Why didn't he bring that up to Judge Bauman?

MR. CHEVIGNY: I didn't get it out of him until Friday. He also says -- I mean, he doesn't -- I mean, he says it put him in fear but it is not the only thing that he didn't testify. The religious ground is also a true ground with him. I mean, he is -- I am afraid he is a kid. That's the trouble. He is a little confused with relation to this.

THE COURT: Let's cover the matter of the alleged intimidation. What is the government's position?

MR. GOLD: Your Honor, the government's position is this: First, we think that's not a timely claim. If in fact such a claim could have been made the time to have made it was clearly before Judge Bauman. The claim was not made.

Secondly, even if such a claim could now be made, I think it is legally irrelevant unless it could come any where near amounting to a defense of duress which, even under the authorities that I have researched is not constituted a defense of criminal contempt. If he is prepared to testify under oath out of the hearing of the jury as your Honor has indicated naming names, places, and asserting that his life was placed in danger.

MR. CHEVIGNY: He is not going to assert that.

MR. GOLD: That is evidence of a crime.

MR. CHEVIGNY: You are not going to be able to get a conviction on his testimony because there is not going to be enough there.

THE COURT: I think what we ought to consider is this, whether this is something that he should be permitted to testify before this jury subject to your cross-examination. You would have the right to cross-examine him about his

failure to bring it up before Judge Bauman, or anything else you wanted, anything that was proper cross-examination.

Now, in my mind it is a question of whether the material is irrelevant as a matter of law so that the testimony wouldn't be permitted, or whether he should be permitted to get on the stand and tell his story, and then if you were able to cross-examine him, and then we will figure out an appropriate instruction, but I am concerned about saying that he has waived that ground by not raising it before Judge Bauman. After all, this is a criminal contempt proceeding. It may be that it is no defense to this proceeding, but to simply preclude him from even testifying would concern me. It doesn't stand on the same basis as the religious objection. The religious objection was raised. It was ruled upon as a matter of law in prior proceedings, and I feel clear that it is a matter of law. Judge Kaufman ruled on the religious thing in the appeal on the civil contempt, did he not?

MR. GOLD: Yes.

MR. CHEVIGNY: It's been ruled on a couple of times.

THE COURT: But this is a new point. Now, to say that it is waived to me disregards the fact that this is to some extent a new independent proceeding, so I am fraid I think we ought to permit him to testify about the facts and

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I think it is better to have it before the jury rather than before the court, and I cross-examine him and then I will instruct the jury, and if it turns out it is no defense I will so instruct the jury, but I don't know yet.

MR. GOLD: Will you hear me briefly, your Honor?

THE COURT: Yes.

MR. GOLD: I share your Honor's concern about the question of waiver. On the question of relevance, however, I am much more clear in my mind. If we were to have an offer of proof under oath outside the hearing of the jury, I think if that is presented it would make it a good deal clearer whether or not the claim as established would constitute a recognizable defense. Indeed, if your Honor were to conclude that it did not, I think having those facts before the jury and then charging them nonetheless it is not a defense so terribly prejudicial to the government. I think if that claim is insufficient to amount to a defense in your Honor's mind, I think it should be kept away from the jury entirely because it technically and legally is irrelevant.

THE COURT: Would you be agreeable, Mr. Chevigny, to have Mr. Huss initially outline his testimony out of the presence of the jury?

MR. CHEVIGNY: Yes.

THE COURT: I think we will do that. Let's do that. Let's take a short break. You can all have a break, and then we will go back in the courtroom and tell the jury to hold on and we can I think clear this up.

MR. CHEVIGNY: Let me make sure I am going to be able to get it out of him now.

THE COURT: All right. You take a recess and then report back to me. In the meantime we will tell the jury that we have some proceedings to take care of, and we will get a report from you after about six or seven minutes. Thank you very much.

(Recess.)

THE COURT: Do you want to put Mr. Huss on?

MR. CHEVIGNY: Yes.

THE COURT: The jury is alerted to stand by. I think we will have it in court.

MR. GOLD: Your Honor, may I inquire, is it your intention to have me cross-examine now? What is the procedure going to be?

THE COURT: I just want to have enough to make a ruling of law as to whether the testimony will be admitted. I really can't proceed otherwise.

Let the record show that we are having this proceeding out of the presence of the jury by agreement of

both sides and the purpose is to permit Mr. Huss to indicate the subjects on which he wishes to testify so that the court can rule whether those items of testimony can be admitted or will be excluded. All right, do you want to call Mr. Huss?

MR. CHEVIGNY: Yes. The defense will call Mr. Huss for an offer of proof with relation to his state of mind.

R I C H A R D H U S S, called as a witness, having been affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. CHEVIGNY:

Q Mr. Huss, do you recall the summer of 1972?

A Yes, I do.

Q Did there come a time when you were out of the City of New York?

A Yes.

Q Where were you?

A I was in Framingham, Massachusetts.

Q What were you doing in Framingham?

A I was working as a stage hand for a dinner theatre.

Q How old were you at that time?

A I was 17.

Q Did there come a time in Framingham that summer when you saw persons that you identified with the Jewish Defense League?

A Yes.

Q Can you tell the court who they were?

A Neal Rothenberg, Gene Kleinhandler and Larry Amsel.

THE COURT: Who did you say?

THE WITNESS: Gene Kleinhandler.

Q Start over and spell them as you go.

A I don't think I can spell them.

THE COURT: I guess it would be K-l-e-i-n-h-a-n-d-l-e-r.

What is the second name?

THE WITNESS: Neal Rothenberg and Larry Amsel.

Q Do you have any idea how to spell Amsel?

A A-m-s-e-l.

Q Do you know whether Mr. Rothenberg had any office in the Jewish Defense League?

A Yes.

Q What was that?

A He was National Coordinator for Youth.

Q Did any of those persons say anything to you?

A Yes.

Q Who?

A Neal Rothenberg and Larry Amsel.

Q What did Neal Rothenberg say to you? First of all, when did this happen, if you recall?

A I suppose about halfway during the summer.

MR. GOLD: Your Honor, may we find out who else was present at the time of this alleged conversation?

THE COURT: Who all was present.

THE WITNESS: Just myself and those three people.

Q You said about halfway through the summer. Can you come any closer than that?

A (No response)

Q Can you give us the month, for example?

A I imagine it was July.

Q What did Mr. Rothenberg say? First, just where did this occur?

A It occurred outside Caeser's Monticello diner and motel in Framingham, more or less in the parking lot.

Q Out of doors?

A Yes.

Q What did Mr. Rothenberg say to you?

A He said that there had been some arrests, that I had previously heard about members of the Jewish Defense League, that there was sort of a witch hunt inside the JDL

because the police had let it be known that there was an informer. I believe they hinted that I was the informer--

THE COURT: Who hinted this?

THE WITNESS: The police.

THE COURT: They said, Rothenberg said that the police had hinted you were the informer.

THE WITNESS: That's right.

Q And what happened then? Did he say anything else to you?

A Yes. He said that certain people inside and outside the JDL might possibly be looking for me in order to find me and I don't know, I guess to do me bodily harm.

THE COURT: It isn't a matter of what you guess. What did he say?

THE WITNESS: He said that there were people looking for me.

THE COURT: That's the end of what he said.

Q Were those his exact words, that they would be looking for you?

A I think so.

Q Did he specify who they were?

A No, he didn't.

Q Did Mr. Rothenberg say anything else to you?

A He said I should be careful, if I heard anything

or saw anything of these people that I should call him if I could. He said not to come back to New York until I had checked with him.

Q Okay. Did he say anything else to you that you can recall now?

A No. He just said to be careful.

Q What did Larry Amsel say to you, if anything?

A Larry Amsel gave me a warning as to the --

Q Don't tell us that he gave you a warning. Tell us the words he said to you, in words or substance as nearly as you can recall.

A I shouldn't get caught in a room with these people, that I should run. He said he wouldn't want to get caught with these people.

Q Did he specify who they were?

A No, he didn't.

Q Did he say anything else?

A I don't think so.

Q What was your state of mind following that encounter?

A I was a little bit confused, and a little bit afraid.

Q Did you subsequently ever receive anything that you would define as a personal threat to you from any person

that you identified with the Jewish Defense League subsequent to that time?

A Not directly as you put it but I called my house after that to find out if anyone was looking for me, and my mother told me that certain people calling themselves friends of mine called up to find out where I was.

Q Did she say who they were?

A No. Just friends.

Q Did you receive anything else that you considered a threat?

A No.

Q Ever?

A Yes.

Q Up to the present time.

A Yes.

Q Would you like to tell us about that?

A After I got back from this job.

MR. GOLD: Your Honor, may we have the time and place please?

Q Yes. Can you tell us approximately when and where?

A (No response)

Q Or exactly, if you know.

A I imagine it was the end of August. No, that's not correct. I think it was the beginning of August, and

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it was in the Jewish Defense League's office in Manhattan.

MR. GOLD: I'm sorry. I don't know what year we are talking about, your Honor.

THE COURT: 1972.

THE WITNESS: 1972.

Q The Jewish Defense League's office where?

A In Manhattan.

Q What happened? First of all, whom did you see?

A I went to see Neal Rothenberg about what he had previously told me, and while I was up there a certain person came up to me --

Q Who was that person?

A That was Bobby Fein.

Q Bobby Fein?

A That's right.

Q And what did he say?

A He more or less said that he hoped I wasn't the informer. He told me that he knew I had family and that he just hoped for my sake that I was not the informer.

Q Did he say anything else?

A Not that I remember.

THE COURT: Did you go see Rothenberg?

THE WITNESS: Yes.

THE COURT: What was that conversation?

A He told me that everything was all right, that they knew I was not the informer. That they thought people were no longer looking for me.

Q Did anything else happen of a nature that you would describe as a threat up to the present time?

A I don't think so.

MR. CHEVIGNY: That is all.

THE COURT: Did you ever tell this to Mr. Smilow?

THE WITNESS: I don't remember.

THE COURT: You don't remember doing that?

THE WITNESS: No.

THE COURT: I don't know where this gets us. There is nothing about what he was thinking about, or motivation, or what effect it had on him at the time that he was called before Judge Bauman in the summer of 1973, so if the proof stopped here, I just don't know what it will do. Do you want to ask him anything more?

MR. CHEVIGNY: All right, I will continue then.

BY MR. CHEVIGNY:

Q You testified before Judge Bauman in June of last year, do you recall that testimony?

A Yes, I do.

Q At the time that you testified before Judge Bauman, did you recall the events of the summer of 1972?

A Not specifically. I guess they were in the back of my mind but I wasn't thinking about them specifically at the time of the trial.

Q Did th[illegible]fluence your decision with relation to testifying in June of last year in part or in whole?

A No, I don't think so.

MR. GOLD: Your Honor, I would think that would terminate the inquiry.

THE COURT: Well, I think it is -- what do you say, Mr. Chevigny?

MR. CHEVIGNY: I would like to put him on in front of the jury and let the jury decide. I think it is a question of fact. He is here. Some of his friends are here. I think that these things don't stop. I think he should be permitted to testify to it and that the jury should be permitted to decide.

THE COURT: Well, he has testified that this was in the form of an offer of proof as to what he would testify. Now, I got to assume that this is the way he would testify, no more, no less.

MR. CHEVIGNY: I'm sure it is.

THE COURT: And he has said that -- let's read the last answer.

(Record read.)

MR. CHEVIGNY: Could I try a little more your Honor?

THE COURT: You can do whatever you wish here.

Q Do you understand my question?

A Yes, I do.

Q Let me take it in two pieces. Did it have any influence on you in the slightest in 1973?

A Well, yes, from what I understood from members of the JDL, I understood -- well, I guess I was threatened.

THE COURT: Now wait a minute. What Mr. Chevigny is asking -- I thought you had covered it, but he is asking -- well, the focus of this case, as you perfectly well know, is on the proceedings before Judge Bauman on June 8th and June 27, 1973.

Now, at that time you were before Judge Bauman. Did the events that you have described have any influence on your decision not to testify before Judge Bauman?

A No, they didn't.

THE COURT: I think we will terminate this. Thank you, Mr. Huss. And we will bring back the jury now and I will rule that the offered testimony will not be permitted.

(Witness excused)

THE COURT: In view of that, Mr. Chevigny, will

you rest? I think you preserved your record. You made your motions. The motions have been denied and you have advised me that you would offer to have Mr. Huss testify on the religious grounds for his objection. I have ruled that that would be inadmissible. You make this offer of proof and I have ruled that that would be inadmissible.

MR. CHEVIGNY: Thank you, your Honor. I respectfully except.

THE COURT: All right. You except. Will you rest then when the jury comes back.

MR. CHEVIGNY: No, I don't have anything. I will rest.

THE COURT: All right. Now, let's just talk about our scheduling. I just want to see what the lawyers would like to do about scheduling.

MR. CHEVIGNY: I prefer to sum up after lunch.

THE COURT: That is perfectly agreeable with me to have summations and charge after lunch. You can take an early lunch so why don't we adjourn now until a quarter of 1.

MR. CHEVIGNY: All right, your Honor.

THE COURT: Let's bring the jury in. I meant to say a quarter of 2. An hour and a half lunch.

(The jury entered the courtroom.)

THE COURT: Ladies and gentlemen, we had a couple of legal matters which detained us and that is the reason we took a fairly long break. Now I think -- well, as I understand it, the defendants rest, is that right, Mr. Chevrigny?

MR. CHEVIGNY: Yes, the defense rests, your Honor.

THE COURT: What remains to be done is to have the lawyers sum up and then have me deliver my charge on the law, and then you will go to your deliberations. I would like to take our lunch break earlier. We will take an hour and a half for lunch and then resume promptly at quarter to 2 and be ready at that point to go right into summations. So again, please don't discuss the case over lunch. And I would like to see the lawyers at 1:30 to go over that one point about the charge we talked about this morning, so the lawyers and I will meet at 1:30 and the jury will be back at a quarter to 2, please.

(Recess to 1:30 P.M.)

AFTERNOON SESSION

1:45 P.M.

THE COURT: I have got the supplemental request number 5 from the government which looks okay to me as far as it goes. Do you have any suggestions?

MR. CHEVIGNY: I'm sorry, I didn't have access to my office but that is what I have.

THE COURT: That's fine.

I think this is substantially the same as what you put in your original charge.

MR. CHEVIGNY: Yes. I tailored it to fit the crime better than I did before.

THE COURT: But it still contains the idea of specific intent and bad purpose to disobey or disregard the law and I will not use that charge. You can get the clerk to mark this for identification so your record is preserved.

MR. CHEVIGNY: All right.

THE COURT: Maybe both of these requests, you get the clerk to mark them for identification.

Now let me just go through, I think I should go through the charges now quickly. And rule on them.

Government's request number 1 granted.

Request number 2 is not granted. I don't see any

reason to quote Rule 42(b), and I don't see any particular utility in giving that summary.

Request number 3 is not granted. I don't think there is any reason to read the community statute. I will explain immunity to the extent that I have to.

Request number 4, I don't see any reason to talk about them having to find that the court had jurisdiction. There is no real issue. I will just outline three elements, the need to be proved. First, that the court gave the particular defendant under consideration certain orders directing the defendant to answer questions and testify.

Second, that the defendant disobeyed those orders.

Third, that the defendant acted wilfully and knowingly in so disobeying. Those will be the three elements outlined.

I will state as a matter of law that Judge Bauman's orders were lawful and proper. I will use part of request number 4 and other parts I will not use request number 5 I will use the government's supplemental request number 5.

Request number 6 I will use part of it and I will expand to explain that the other objections were made invalid as a matter of law.

MR. GOLD: Your Honor, with regard to that, I will find it terribly helpful in lining up my summation. I take it you are going to leave out the bottom portion of that charge. If you remember, I don't want to get into it in my summation.

THE COURT: I won't quote. You mean the quotation part from Smilow?

MR. GOLD: Yes.

THE COURT: I wouldn't go into that in my charge.

Now, request number 7 is granted.

Request number 8 is granted in substance. Under the miscellaneous requests I will discuss presumption of innocence. I see no reason to marshal the evidence. I will discuss presumption of innocence. The jury's province is to determine the facts with the limited issues presented here. There is no reason to really go into the jury's recollection controlling. All the evidence is in writing. Statements of counsel. I will give an instruction about that. I will give an instruction about burden of proof and reasonable doubt. I will give an instruction about a unanimous verdict. And about the defense testimony, you didn't present anything about -- well, the defendants didn't testify. Do you want an instruction about their right not to testify.

MR. CHEVIGNY: That would be good, yes. I should

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have thought of that.

THE COURT: Okay.

Now let me go to Mr. Chevigny's -- I will certainly -- there are basically three -- well, the defense proposed charge about the elements I think is basically correct. A listing of the elements, although I will instruct the jury that the orders of Judge Bauman were lawful, then the joint trial of the defendants, I will give that instruction, and as we -- I will not give the instruction requested about intent or wilful, the definition of wilful. I will give an instruction about presumption of innocence which is substantially the same as --

MR. GOLD: Your Honor, may I inquire, do you intend to use the term moral certainty in your charge on reasonable doubt?

THE COURT: No, I wouldn't use that. I will use the standard charge on this in this district. We don't use moral certainty.

Now, I have got to make a note to myself to put this in.

(In the courtroom. Jury present.)

THE COURT: Mr. Chevigny.

MR. CHEVIGNY: Thank you, your Honor.

Ladies and gentlemen of the jury, this has been

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a short case, as you know, I am sure we all feel it's been rather extraordinary as criminal cases go. The government has read into the record the refusals of these defendants to answer the questions put to them by the United States Attorney and by the Judge in the earlier proceeding that was mentioned to you, and I suppose now the question in everyone's mind is what is to be said about this.

I have this to say to you: It is a simple case. I don't want to take a lot of your time but the case is extraordinary in that what was read to you tells you a great deal more about these defendants and what happened with relation to their testimony than you would ordinarily learn in a criminal case.

You learned from the government's proof that the defendants did refuse to answer, that they refused to answer because they felt that it was a violation of their religion, because they felt it was a violation of their religion to take a reward for betraying other persons in their religion.

You learned that they were subjected to civil contempt. That they took their issues up on appeal. That they were put in jail for that civil contempt. That they suffered a penalty for that.

You learned that they are both very young men.

That Jeffrey Smilow answered that he was 18 years old at the time he was asked those questions.

You learned that from this very record, from the words of Judge Bauman, that there is a possible limitless penalty for the crime that is charged here.

I am not going to pretend to you in some way that they answered the questions. I am not going to play any tricks with you. The charge will charge you with relation to the law that the defendants, the Judge intends to charge you that the orders of Judge Bauman were lawful. It seems to me the question for you to decide is whether within the meaning of the law there was an intent on the part of these defendants to show contempt for the court, whether their intention is to defy the law within the meaning of the law.

The Judge will charge you that this is a crime which requires wilfulness, which requires intent. Wilfulness to show contempt for this court, for the judge or judges of the Southern District of New York.

In light of the fact that the defendants asserted that their religion would not permit them to testify against another Jew you have to ask yourselves whether that shows a wilfulness to show contempt for the court or whether it doesn't show a respect for a higher law.

Finally, I ask you to do justice generally in this

case. Consider the fact that the defendants have been found guilty already of civil contempt, that they have already suffered for this crime. Consider that when you make your decision.

I ask you to take their age into account but to consider in particular, in light of the charges that the Judge is going to give you, whether you can really say beyond a reasonable doubt that the defendants wilfully, within the meaning of the law, committed a contempt of this court.

THE COURT: Mr. Gold?

MR. GOLD: Ladies and gentlemen, the evidence of the guilt of each of these defendants is overwhelming. They are absolutely inescapable.

In a few minutes his Honor is going to give you detailed instructions on the law and accordingly the only remaining issue in this case is whether or not you are going to apply the law as he gives it to you to the facts already before you.

I submit that if you do that, you really have no choice but to return a verdict of guilt against each of these defendants.

As his Honor will shortly instruct you, in order to prove its case, the government has to prove three things:

First, we must show that the court, Judge Bauman,

gave each of these defendants an order or a command. The evidence shows that Judge Bauman did precisely that in the course of the fire bombing trial. The evidence shows that he did so not once but repeatedly, time and time again in the clearest conceivable way.

I expect that his Honor will shortly charge you that Judge Bauman's orders were lawful and proper in every respect.

Second, we must also show that the defendants disobeyed those orders. What is the proof of that? You have heard the evidence this morning that each of these defendants refused to answer when ordered to do so time and time and time again.

The evidence is that they refused to obey those orders with complete awareness of what they were doing with a complete understanding of the extent of those orders.

Finally, the government has to show that the defendants acted wilfully and knowingly in refusing to obey Judge Bauman's orders.

Is there really any question at all that the defendants understood what Judge Bauman's orders were? Is there really any question that understanding those orders, they nonetheless refused to obey?

Reading from Government's Exhibit 3 in evidence,

you will recall that on June 27, 1973, both defendants were recalled to testify as government witnesses.

In the course of that proceeding, Judge Bauman told Mr. Huss the following:

"Before this goes any further, Mr. Huss, I want to tell you something. I explained the last time that your failure to answer questions when I have ordered you to answer constituted contempt of court. I told you that my having committed you for civil contempt does not preclude the bringing of charges of criminal contempt against you.

I again want to advise you of that, and I want to make other things abundantly clear to you, Mr. Huss."

You will recall that at that point he explained how he was going to urge the United States Attorney to commence a criminal prosecution for criminal contempt of court.

What was Mr. Huss' response to that? Mr. Huss said "I understand, your Honor."

Thereafter Mr. Huss refused to answer seven more times. Each time Judge Bauman ordered him to do so. Then Judge Bauman said "I want to again advise you that your refusal to answer these questions over my order constitutes in my view criminal contempt of court. I want you to have this in mind. I now order you to answer. Mr. Huss' response

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"Same declination." What about Mr. Smilow? He was also recalled to testify on June 27th. He told Judge Bauman that he would refuse to answer every question put to him as he had on June 8th the previous occasion when he testified.

Judge Bauman told Mr. Smilow, for now I believe and I advise you, sir, that your failure to answer questions which you are now looking at, at the last session at which you were called upon to testify constitutes criminal contempt of court and that the punishment for criminal contempt is without limit. Is that clear?

DEFENDANT SMILOW: "Yes."

The court then asked Mr. Smilow if he was present in the courtroom when the judge advised Mr. Huss about what was going to happen to him if he continued to refuse to testify.

Mr. Smilow responded "Yes. I was in the courtroom.

"Bauman: You heard the entire situation. All the questions and everything I said to Mr. Huss?

"Smilow: Yes."

The overwhelming evidence is that Judge Bauman warned both defendants of the consequences if they persisted in their refusal to disobey his order.

He told them over and over and over again that if they refused to testify, they would be prosecuted for

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criminal contempt.

I submit that the evidence clearly shows that both defendants were in full awareness of Judge Bauman's admonitions. They understood everything he said. Nonetheless, they literally chose to be found in contempt. They literally subjected themselves to their prosecution.

As I have already said, the evidence in this case is absolutely overwhelming. It is just staggering. And I want to talk to you for a minute about something which might be of concern to you now and that is this: Why are we here? Ladies and gentlemen, the answer to that question is simple, straightforward, and I submit that it is something that we can all take great pride in, and it is this: under our system of justice, every person in this country, no matter what crime he may have committed, no matter what crime he may be charged with having committed, no matter how overwhelming the evidence of his guilt, that person is entitled to say to the government, "You prove it." I submit to you ladies and gentlemen that is precisely what we have done here today. The defendants have in effect challenged the government to prove their guilt beyond a reasonable doubt. It is a challenge which we accept without hesitation. It is a challenge I submit to you that we have met with overwhelming proof. I urge you please don't hold it against these defendants for

having put the government to its proof. That was their absolute right.

Now Mr. Chevigny didn't have too much to say about the evidence in this case. That is understandable. We all find it difficult to make value judgments about other human beings, but as his Honor told you at the beginning of the case, and as I expect he will tell you in a few minutes, sympathy has absolutely no place whatever in a court of law. If it did, if sympathy were given decisive weight in a criminal case, the sympathetic defendant would always go free no matter how terrible the crime he committed, no matter how overwhelming was the proof of his guilt. Your job is to weigh the evidence dispassionately and thoroughly to both sides. And I submit that if you do that in this case, in accordance with the instructions which Judge Friesa will give you in a few minutes, you will find that the evidence overwhelmingly establishes a violation of federal law. But I urge you to consider something else.

The laws of this country are not self-constituting. In a very real and immediate sense our laws, although enacted by Congress, are not enforced until a court of law and a jury see to it that they are enforced.

As the jurors in this case, that is your responsibility. Indeed, it is your absolute sworn duty to do just

that. I trust that your collective judgment will be to uphold and enforce the law by returning verdicts of guilty against each of these defendants and by doing that you will reaffirm what hopefully each of us believes, namely, that no man, no matter who he is, can place himself above the law. Thank you.

(At the bench.)

THE COURT: I was a little taken aback by your comment about the civil contempt penalty. The government does not -- I don't think there is anything in the record to show any amount of jail. Were they in jail?

MR. GOLD: My understanding is that they were remanded. I don't know how many days in fact they spent in custody. I tried to cut that out but I didn't want to make an objection because I thought it would be prejudicial.

THE COURT: The thinking is, I know Judge Bauman ordered them remanded but then there were the appeals, and I don't know whether they were out on bail pending that appeal. I would like to know the facts.

MR. CHEVIGNY: I don't know how many days they did. Do you want me to find out?

THE COURT: Yes. I would appreciate that.

(Pause)

MR. CHEVIGNY: Huss was in 26 days and Smilow was

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in 21 days.

THE COURT: All right. I am not going to -- I will have to instruct the jury that they cannot consider that but anyway I won't go into any facts that are not in the record. All right. I will go ahead with my charge.

MR. CHEVIGNY: Your Honor, would this be a good time to mark these exhibits or shouldwe do that after you charge?

THE COURT: Afterwards.

(In open court.)

(Two marshals sworn.)

UNITED STATES OF AMERICA

VS.

73 Cr. Ms. 25
73 Cr. Ms. 24

RICHARD **HUSS** and JEFFREY H. **SMILOW**,

Defendants.

July 16, 1974

(T. P. GRIESA, DJ)

CHARGE OF THE COURT

THE COURT: Let me first thank the lawyers for both sides for their courtesy and cooperation and their efficiency, and let me thank you ladies and gentlemen of the jury for your attention.

We had a long questioning session yesterday, but the proof has been short. In any event, whether a case is long or short, it is worthy of the most serious consideration in a criminal matter and I know that you have given it your most earnest consideration and you will continue to do so until your responsibilities are discharged.

A case, whether it is short or long, or whether it is a regular criminal case or a criminal contempt proceeding, whatever the nature, a criminal matter is inevitably important. It is important to the government, to the community, to have the criminal laws of this community enforced, and to have lawful

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orders of a court of law carried out.

At the same time, this criminal case is important to these defendants because they are charged with a serious crime that inevitably makes the case important to them. All this is obvious but needs to be said so that you know emphatically that your responsibility here is one of great importance to be carried out properly.

Now we are at this stage in the trial, the final stage in the trial where you as the jury and I as the court carry out our final functions.

As I said at the outset, you as the jurors must not act in this courtroom on this case with any form of bias or prejudice or emotion either for the government or against the government, or for the defendants or against the defendants.

Any bias or personal feeling, inflamed feeling, or sympathy has no place in a court of law in this kind of a case.

As I said this morning, but will repeat, the case must be decided on the basis of the evidence and the rules of law. If you or I were to disregard the evidence and the rules of law and were to make

up our minds on the basis of emotion, then we need not have court proceedings.

Now, my final function as the judge or the court is to instruct as to the law. It is your duty and responsibility to accept my instructions on the law whether you may like them or agree with them, or otherwise. Your function as the jury is to take the law as I give it to you and apply it to the evidence, and then render your verdicts.

As you know, the evidence in this case consists solely of the transcripts of the proceedings before Judge Bauman in addition to the brief stipulation as to the authenticity of these transcripts.

You heard the transcripts read to you. They are documentary exhibits in the case and they will be available for you to peruse during your deliberations to the extent you feel you need to do so. But basically, those transcripts are the evidence, and that's what you need to apply the law to and render your verdicts.

Although these two defendants have been tried together for convenience, you must consider the case of each defendant separately and individually. That

is, you must consider separately whether the government's evidence is sufficient to convict the defendant Huss, and then you must consider whether the government's evidence is sufficient to convict the defendant Smilow. And then render your separate verdicts on each defendant.

Anything that the lawyers either for the government or for the defendants have said during the trial, during the opening statements, or during summations, anything they have said with regard to the evidence or with regard to their view of the evidence, is not to be substituted for the actual evidence. The statements of counsel are not in and of themselves evidence.

They make, in the case of the government, an opening statement, and in the case of both sides they have made summations to tell you their arguments about what the evidence has or has not proved and about the significance of that evidence. But the actual evidence is what I have told you it is, and neither the lawyers' statements nor, indeed, anything I say actually is a substitute for the real evidence.

The government has the burden of proving the charges against each defendant beyond a reasonable

doubt. A defendant in this case, as in any criminal case, is not required to prove his innocence. On the contrary, the defendants in this case, as in any criminal case, are presumed at the outset to be innocent of the accusations against them. The presumption of innocence is in the defendant's favor at the start of the trial. It is in the defendant's favor as I instruct you now, and the presumption of innocence remains in favor of each defendant during the course of your deliberations in the jury room.

That presumption of innocence is removed only if and when you are satisfied that the government has sustained its proof, its burden of proving the guilt of each defendant beyond a reasonable doubt.

What do we mean by "reasonable doubt"? These are words that are almost self-defining but a little explanation may help.

A reasonable doubt is a doubt founded in reason. The key word is "reason" arising from the evidence or the lack of evidence. It is a doubt which a reasonable thinking person has after carefully weighing all the evidence. It is a doubt which would appeal to common sense or experience.

But let me say some things which "a reasonable doubt" is not. A reasonable doubt is not caprice or whim. It is not just speculation, conjecture, suspicion. A reasonable doubt is not an excuse to avoid the performance of an unpleasant duty.

Now, if, after a fair and impartial consideration of all the evidence you can say that you are not satisfied as to the guilt of a defendant, if you have such a doubt as would cause you as prudent persons to hesitate before acting in some matter of importance to yourselves in your own lives, then you can say that you have a reasonable doubt, and in that circumstance it is your duty to acquit the particular defendant whom you are considering.

On the other hand, if, after this impartial and fair consideration of all the evidence, you can say that you do have an abiding conviction of the defendant's guilt, the particular defendant you are considering, such a conviction or persuasion as you would be willing to act upon in important matters in your own lives, then you can say you have no reasonable doubt, and under these circumstances it is your duty to convict the particular defendant you

are considering.

One final word on this subject is this: proof beyond a reasonable doubt doesn't mean proof to an absolute certainty beyond all possible doubt. If that were the rule, few persons, however guilty, would ever be convicted. It is almost impossible for a person to be absolutely convinced of any controverted fact unless it is in the realm of mathematics, perhaps. So the law of a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Now, let me read to you the brief statutory provision with which we are concerned. In this case each of the defendants, Richard Huss and Jeffrey Smilow, is charged with criminal contempt of court for their allegedly willful refusal to obey orders of Judge Bauman of this court to testify at a criminal trial.

The statute upon which this charge of criminal contempt is based is contained in Title 18 United States Code, Section 401, which provides in part as follows:

"A court of the United States shall have power to punish at its discretion such contempt of its authority as disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

That is the statute which is being applied in this case. It is further the law that in this type of criminal contempt case the trial is to a jury.

Now let me outline to you the three elements which you must find the government has proved beyond a reasonable doubt as to each defendant before you can convict that defendant. In other words, in order to convict either the defendant Huss or the defendant Smilow, you must find as to each one that the government has proved beyond a reasonable doubt these three elements.

First, that the court, namely Judge Bauman, gave the particular defendant certain orders directing that defendant to answer questions and testify.

Second, that the defendant disobeyed those orders.

Third, that the defendant acted willfully, and knowingly in disobeying the court orders.

Concerning the first element relating to the

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giving of orders by Judge Bauman, I instruct you that if you find from the evidence that Judge Bauman gave the orders, I instruct you as a matter of law that those orders were lawful and proper in every respect.

I instruct you that those orders, if you find that they were given, didn't violate any constitutional or other legal rights of either of these defendants.

I have told you, in connection with describing the elements which you must find proved in order to convict, that you must find that the particular defendant you are considering disobeyed Judge Bauman's orders and did so willfully and knowingly.

Now, what is meant by "willfully and knowingly"? Let's bring it down to the specifics of this case rather than talking in the abstract. I instruct you that if you find beyond a reasonable doubt that the defendant that you are considering understood Judge Bauman's orders and consciously refused to obey those orders, that defendant's conduct was willful and knowing.

Now, you will recall that both the defendant

Huss and the defendant Smilow, during the first part of their questioning by Judge Bauman, according to the evidence in the transcript, asserted their Constitutional privilege against testifying in ways that might incriminate themselves.

You will also recall that Judge Bauman granted both Huss and Smilow immunity from prosecution, and both Huss and Smilow stated that they understood that they had received immunity.

After being granted immunity, neither Huss nor Smilow raised the self-incrimination problem again.

In any event, I instruct you that the privilege against self-incrimination was not a valid reason for refusing to testify before Judge Bauman after the judge had granted them immunity.

The privilege against self-incrimination is not a defense in this criminal contempt case as to either of the defendants.

The invoking of the privilege in the earlier proceeding is no defense here. I don't understand it is even claimed to be, but lest there be any confusion, I want to make that clear.

Now, you will also recall that both Huss and Smilow asserted before Judge Bauman that they should not be required to testify because of what they said were certain

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rules of Jewish religious law.

You will recall references to that in the transcripts and you will recall references to that in the defense' summation just now.

Now, Judge Bauman advised both Huss and Smilow that this religious objection was not in fact a valid ground for refusing to testify.

I instruct you now, as a matter of law, that the religious objection was not a valid ground for refusing to testify.

I further instruct you that the religious objection is in no way a defense to the present criminal contempt case.

With all respect to defense counsel, I must instruct you that you are not entitled to consider, in your deliberations, the religious objection or the obedience to a higher law. You are not allowed to consider that on the question of whether either of these defendants is guilty of criminal contempt. That religious objection is not a valid defense here nor was it a valid ground for refusing to testify in the proceedings before Judge Bauman.

Our law, for obvious reasons, simply does not and cannot recognize the right of a member of any religious faith, whether it is Jewish, or Presbyterian, or Catholic,

or what, to refuse to testify in a criminal proceeding against another member of that faith, for an alleged religious reason.

You will further recall that Smilow, when he was asked to testify, asserted certain additional grounds for his refusal to testify. I think you will recall that he stated that he was being subjected to double jeopardy and that certain evidence had been unlawfully obtained by the government which gave information concerning him.

These were points of law which Smilow and his attorney related at that time to Judge Bauman.

Now, Judge Bauman held that none of these grounds asserted by Smilow constituted valid reasons for his refusal to testify, and none of these grounds presents any valid defense to the present criminal contempt case.

Let me summarize. A witness called in a court of law cannot refuse to obey a court order to testify because of certain personal religious reasons, as to any legal matter such as double jeopardy, and so forth. A witness cannot make his own private determinations. You can submit these arguments, as well as any asserted religious argument, or any argument whatever, to the court. He has a right to go to an appellate court beyond Judge Bauman, as occurred in this case, but once the courts have ruled against those

arguments, that witness is required to obey the court's order. He cannot simply go by his own private determinations and convictions.

Let me return to the element we discussed earlier. When I told you that the government must prove that the defendants refused to obey the orders of Judge Bauman knowingly and wilfully, the elements of knowingly and wilfully, I say, again, that the only issue here on that point is whether the particular defendant understood Judge Bauman's order and whether or not defendant consciously refused to obey those orders.

Now, as I said earlier, the government has the burden of proving the case. In this instance, as in any criminal case, the government has the burden of proving the case.

The government contends that it has done so by introducing the authentic transcripts of the hearing.

I should remind you here, as in every criminal case, that the defense doesn't have to prove its case. The sole burden is on the government, which contends it has done so, but the defense does not have to put in any evidence.

The defendants do not have to testify. Indeed, they have a Constitional right in this proceeding not to testify. They are the defendants here. Huss and Smilow are the defendants in this trial as distinguished from the

defendants in the earlier trial.

As to this trial in this court, the government has the sole burden of proof. The defendants are not required to testify and you are not permitted to draw an inference in this trial simply from their failure to testify. The government doesn't even ask or suggest that such an inference be drawn.

The government contends that its proof is fully shouldered, the burden of proof is fully shouldered by the introduction into evidence of the transcripts.

Now, a few remaining points need to be covered. Under your oath as jurors you cannot allow a consideration of the particular punishment or speculation about punishment or sentence to enter into your deliberations or to influence you in any way. The duty of imposing sentence, in the event there is a conviction by the jury, rests exclusively on the court. Your function as jurors is to weigh the evidence in the case and to determine the guilt or innocence of the defendants solely upon the basis of the evidence and the law.

I think you will recall both from the transcript and the summations reference to unlimited punishment, or something of that kind, in a criminal contempt proceeding. Unless there will be any confusion in your mind, I think I

should say this as long as the point has come up: the statute does not itself specify a particular term of years, or a particular range, and that is what Judge Bauman was talking about when he made the reference he did. And the particular sentence to be imposed in the event of a guilty verdict would be up to me. But lest there is any confusion about the term "unlimited punishment," I can state categorically that there would be or could be nothing, in reality, which would involve unlimited punishment, and as in any case, the court takes into account the nature of the conviction, the nature of the crime, and imposes a punishment commensurate with that.

As long as the point has come up, I think that should be cleared up lest there be any confusion.

Reference has also been made to the possible argument that the defendants have already suffered a penalty by virtue of being incarcerated for the civil contempt. I think it's already been explained to you, but I will reiterate it.

In the course of a trial, when a judge is faced with a witness who refused to testify, the first thing the judge may do is to hold him in civil contempt and put him in jail to try to get him to testify. The judge is interested at that point in getting the trial going and

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making sure the witnesses do their duty, and that's what's called a civil contempt proceeding, and the way for the witness to get out of jail at that point is to agree to testify, and the judge is trying to get him to testify by using punishment of that kind.

Now, a criminal contempt proceeding is of a completely different nature. The fact that there was a civil contempt proceeding is a completely irrelevant situation. It doesn't substitute for or prevent, or make unnessary a criminal contempt proceeding, and if, in a given case, an attempt to obtain testimony fails, if the civil contempt proceedings fail, then the courts are free, and under certain circumstances are obligated to go ahead with a criminal contempt proceeding which constitutes or provides for a punishment for the breakdown of the entire proceedings.

So, in summary, you as jurors are not permitted in any way to consider that the civil contempt proceeding make unnessary or invalidates, or affects this criminal contempt proceeding in any way. This is an independent proceeding, and you cannot consider that it is nullified or made unnessary in any way by the prior contempt proceeding. Your focus has to be on what's before you in this court in this criminal contempt proceeding.

Now, finally, if you have, after your deliberations, a reasonable doubt about the guilt of either of the defendants, you should not hesitate for any reason to find a verdict of acquittal as to that defendant.

On the other hand, if you should find that the government has met its responsibility of proving a defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty as to that defendant.

Now, when you retire to the jury room in a few minutes, I am certain that you will treat each other with consideration and with respect. If there are any differences of opinion which arise, I am certain that your discussions will be reasonable, calm, and carried out with dignity.

You are each entitled to your own opinion, and no juror should acquiesce in a verdict that is against his own personal particular judgment.

On the other hand, no one should enter a jury room with such pride in his own opinion that he refuses to change his mind no matter how intelligent is the argument of his fellow jurors. Discussion and deliberation are the basic elements of the democratic jury process, so if you have differences, take them and talk them out. Each

of you should decide the case for himself or for herself.

After thoroughly reviewing the evidence and frankly discussing it with your fellow jurors with an open mind and with a desire to reach a verdict, then and only then should each of you, individually, should decide the case for himself or for herself. If you do that, you will be acting in the true democratic tradition of our American jury system.

There are twelve of you on the jury. The alternates will be excused in a moment with the thanks of the court before the jury retires.

Any verdict of the jury, guilty or not guilty as to either one or both of the defendants, must be a unanimous verdict of all twelve jurors and must, of course, represent the honest conclusion of each of the twelve.

If you have any communications for the court, they should be submitted in writing through your foreman. Juror No. 1 will be the foreman unless for some reason she declines to act, and then the jury will elect someone else as the foreman. But if Juror No. 1 is willing to act as foreman, she will do so.

After your deliberations have been concluded, and when you are ready to announce a verdict, your foreman should send a note to the court saying that you have a

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verdict and are ready to announce it.

There will be two marshals stationed outside your jury room, and they will convey any messages that you have.

When you send your note saying that you have a verdict, please don't say what the verdict is. The verdict should be announced in open court when we all gather and at that time you will need to announce your verdict of guilty or not guilty as to the defendant Huss, and then guilty or not guilty as to the defendant Smilow.

This concludes my charge. I would like to have you hold your places for a moment and I will give the lawyers an opportunity back in the robing room to tell me if there are any mistakes or anything to be corrected or added to the charge. I think it will just take a moment, and I think you could hold your places and give us that time to do that.

(In the robing room.)

THE COURT: All right. The government?

MR. GOLD: We have nothing, your Honor.

THE COURT: Mr. Chevigny?

MR. CHEVIGNY: I have no requests for additions. I have some exceptions but they could be taken after you send the jury out.

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THE COURT: On basically the same grounds you made before?

MR. CHEVIGNY: Yes; on wilfullness, and I would except to your's Honor's charge with relation to the fact that you in effect stated that you would not give them an unlimited sentence. I would except to those two portions of the charge.

THE COURT: All right. Those are overruled.

(In the courtroom.)

THE COURT: There is no correction or additional charge that I will make.

And as to the alternates, you will be excused now. The jury can only deliberate as a jury of twelve. The clerk will tell you where to report.

Alternates, even in a short case, are a necessary insurance policy, so we thank you both very much, and the jury can now retire to deliberate.

(Two alternate jurors discharged.)

(The jury left the courtroom at 2:55 PM.)

(Time noted. 3:30 P.M.

(In the robing room.)

THE COURT: I have a note. Received at 3:24 P.M. The jury are ready with the verdict so we will call the jury back in and take the verdict.

(In open court. Jury present.)

THE COURT: Have you agreed upon a verdict?

THE FOREMAN: Yes, we have.

THE COURT: How do you find the defendant Huss?

THE FOREMAN: We the jury find Mr. Huss guilty.

THE COURT: How do you find for the defendant Smilow?

THE FOREMAN: We the jury find Mr. Smilow guilty.

THE COURT: Do the defendants wish the jury polled?

MR. CHEVIGNY: No, your Honor.

THE COURT: That concludes the proceedings with the jury. I thank you again. As I stated before I thank you for your attention and for your service and you have discharged your responsibilities well as good citizens and jurors. We thank you very much. I would suggest this: the jurors now, following their discharge from the case, are obviously free to speak to anyone they wish to speak to, whether it be attorneys, or the parties or anyone, or the press. But I would counsel you not to do so. I think that the jury's deliberations in a criminal case can well be

considered something made in confidence and I would advise and counsel you to keep your own counsel and not to discuss your deliberations with anyone whether it is an attorney, a defendant, family members of the defendants, friends of the defendants or people from the press. And certainly no one has a right to approach you or press you in any way. So with those instructions, again with my thanks, you are discharged.

And I would ask everybody in this courtroom to hold their places until the jury is off the floor.

(The jury was discharged.)

MR. GOLD: Your Honor, at this time I have an application on behalf of the government. We would move pursuant to Title 18, United States Code, Section 3148 to have these defendants remanded on all three grounds specified in the statute.

First with regard to risk of flight. I think that risk is obvious in this case. It is my understanding that at least one of the defendants in the underlying fire bombing case has already fled. In light of the fact that these defendants are now convicted face unlimited punishment I don't think I need to say anything further about risk of flight. with regard to the defendant.

THE COURT: The term unlimited punishment is an

unfortunate term. Nobody faces unlimited punishment.

MR. GOLD: Punishment in the discretion of the court.

THE COURT: Okay.

MR. GOLD: With regard to the second element, danger to the community, evidence that was not presented in this court today which now I would like to bring to the court's attention is that Mr. Smilow in fact has pleaded guilty to arson arising out of the events of January 26th, 1972.

THE COURT: In what court and when was that?

MR. GOLD: That was in the New York State Supreme Court on November 27, 1972, before the Hon. Harry B. Frank.

THE COURT: Let me get that.

MR. GOLD: I have a copy.

THE COURT: What is the date please?

MR. GOLD: November 27, 1972. I have a copy of those minutes if your Honor would like me to hand them up.

THE COURT: Judge Frank?

MR. GOLD: Yes, sir.

THE COURT: What happened as a result of that guilty plea?

MR. GOLD: January 8th it was set for sentence and I do not believe that a jail sentence was handed out.

THE COURT: All right. What else do you have?

MR. GOLD: Mr. Huss as we know has refused to testify about the events leading up to and following the fire bombing. Consequently I would submit that with regard to his representing a danger to the community, that danger does in fact exist with respect to him as well.

Thirdly, in light of the extensive legal treatment that the Second Circuit has already given the issues in this case, and in addition, your Honor has already filed a rather extensive opinion regarding the legal issues in this case, I don't believe there now exists any serious appellate issue. And consequently I think the statute is clear that under these circumstances the defendants should be remanded at this time.

THE COURT: I would like to consider that in conjunction with the sentence date. Mr. Chevigny, I hate to even suggest it but I guess I will, would you give any consideration to an immediate sentence or sentence within the next week or so without waiting the usual six weeks for a pre-sentence report? Is there anything about the particular circumstances of this case that you or Mr. Gold might feel would make a regular pre-sentence report unnecessary? I don't know. I just wanted your comments.

MR. CHEVIGNY: I think it would influence your Honor

favorably.

THE COURT: All right. Then there is no question that we will certainly await the normal pre-sentence report. That means that there cannot be sentencing until early September.

MR. CHEVIGNY: Yes, your Honor.

I would like to be heard with relation to the remand issue.

THE COURT: Certainly. All right. Let's get our schedule fixed. I would then fix the sentence for 1 o'clock on Wednesday, September 11th, and that will be in room 1505, and the pre-sentence reports are in order.

All right, let me hear you on the application for a remand.

MR. CHEVIGNY: Yes. The bail in this case has been extremely large, your Honor. It is $50,000.

THE COURT: Who set the bail?

MR. CHEVIGNY: Judge Bauman, I believe.

MR. GOLD: I believe that's correct, your Honor.

MR. CHEVIGNY: It is enormous. For these defendants it's been an enormous burden for their families. I think there is an absolute assurance of their return. They have various ties in the community. Their families are here. Their families have supported them personally although not

their beliefs and what occurred here of course. Mr. Smilow is in school.

THE COURT: Let's take each man one at a time. Mr. Huss, how old is Mr. Huss now?

MR. CHEVIGNY: He's 18 now. He was 16 at the time, your Honor.

THE COURT: He's 18 now. And is he in school now?

MR. CHEVIGNY: He is not in school this summer. He is working for his father but proposes to go to school in the fall. Of course if he is serving --

THE COURT: He finished his school year?

MR. CHEVIGNY: He finished his school year and is out.

THE COURT: What school? Where and what?

DEFENDANT HUSS: Your Honor, I graduated from high school in '73 and before the summer for six months before that I went to night college at Staten Island Community College. I am presently preparing an application for New York University.

THE COURT: Were you in school fulltime last year, the '73-'74 year?

DEFENDANT HUSS: No, I wasn't. Partime.

THE COURT: You were partime at what, Staten Island?

DEFENDANT HUSS: Community College. Your Honor,

during the day I was fulltime employed.

THE COURT: Who did you work for during the day?

DEFENDANT HUSS: My father.

THE COURT: What business did your father have?

DEFENDANT HUSS: Huss Furniture Company.

THE COURT: Where is that located?

DEFENDANT HUSS: In Staten Island.

THE COURT: You live with your mother and father?

DEFENDANT HUSS: Until recently, yes.

THE COURT: Where do you now live?

DEFENDANT HUSS: I live with my father.

THE COURT: Is your mother deceased or what?

DEFENDANT HUSS: No. They are separated.

THE COURT: Is your mother living in New York City still?

DEFENDANT HUSS: In Staten Island; yes, sir.

THE COURT: Are you still in touch with your mother?

DEFENDANT HUSS: No.

THE COURT: Do you have brothers and sisters?

DEFENDANT HUSS: Yes, I do.

THE COURT: Tell me about them.

DEFENDANT HUSS: I have a brother who is 15. He will be 16 on September 11th. I have a sister that's 10 or

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11. She is 11. Your Honor, during this time I am also parttime employed for a commercial photographer on Staten Island.

THE COURT: What is the name of the photographer?

DEFENDANT HUSS: His name is Jeffrey Klements.

THE COURT: Is there any other information about Mr. Huss that you want to present, Mr. Chevigny or Mr. Huss that you wish to present?

MR. CHEVIGNY: I would like to say more about the other issue raised--

THE COURT: I will tell you what would help me, if I could get the facts from Mr. Smilow and his residence.

MR. CHEVIGNY: Tell him where you live and what you are doing.

THE COURT: I live in Brooklyn with my parents.

MR. CHEVIGNY: What is the address?

DEFENDANT SMILOW: At 1050, 54th Street in Brooklyn. And I am presently attending City College.

BY THE COURT:

Q (To defendant Smilow) And do you have brothers and sisters?

A I have two brothers and no sisters.

Q How old are your brothers?

A My oldest brother is 27. And he is going to school

now.

Q Your other brother?

A My other brother is 26 and works by my father.

Q What business is your father in?

A We have a shirt factory.

Q What is the name of that factory?

A L & L Shirt Company.

Q Can you speak a little louder?

A L & L Shirt Company.

Q That is your father's company?

A Yes.

Q And your schooling?

A I am attending City College uptown now. I just completed my sophomore year. I am going to summer school now. And I am majoring in civil engineering.

THE COURT: All right Mr. Chevigny. What is the form of the bail? In each case.

MR. CHEVIGNY: There are family houses in both cases.

THE COURT: What security or what?

MR. CHEVIGNY: Security. Yes, as security for the $50,000. The family houses have been put up in both cases.

THE COURT: In what form is the bail?

MR. CHEVIGNY: A bond.

THE COURT: A bond.

MR. CHEVIGNY: Yes, sir. With real estate as security.

THE COURT: To the bondsman.

MR. CHEVIGNY: Mr. Smilow of course returned -- well, both defendants have come to court every time. Mr. Smilow showed up for his sentencing on that arson charge in which he didn't know whether he was going to be sent to jail or not. As it happens he was not but he did appear on those times.

THE COURT: What sentence was given by Judge Frank?

MR. CHEVIGNY: It is in the record here and it was taken out. Let me see if I can give it to you. It is an E felony. He got five years' probation, your Honor.

THE COURT: Any fine?

MR. CHEVIGNY: No, no fine.

MR. GOLD: I think that the likelihood of flight and the like and the close relationships of these young men to their families and the family homes is very small.

MR. CHEVIGNEY: With relation to danger to the community I must confess I find the U.S. Attorney's remarks opaque on that point.

I would say this and I will say it again at the

sentencing: I don't intend to excuse what happened here. I know that someone died and so do the defendants,but they didn't think that therewas going to be a fire bomb there. They didn't intend to commit an act of violence that would injure anyone. I know that someone did do it and I don't condone it and they don't either but they didn't propose to commit an act of violencce that would injure someone then. They are not violent people, and I think that whatever their sentence, I think that their experience with relation to this has been sobering if not frightening in that they in no way represent a danger to the community. With relation to the legal issues, your Honor has made a decision but nevertheless I think the issue is open with relation to whether we had the right to raise anew those issues because this was an entirely new proceeding being a criminal contempt and I do intend to raise those issues.

Finally I would like to say this: Mr. Smilow being in summer school has invested some time and energy in getting into summer school,and it would even if in fact your Honor does remand them at the time of sentence as you would of course, and there is no possibility of -- or if there turns out to be no bail pending appeal it would nevertheless be much less disruptive to their lives and I think it would be fully as much carry out the terms of the court if they

were to be remanded at the time of sentence because Mr. Smilow is now in school and it would enable them to arrange their lives so that they would be able to serve whatever sentence it is your Honor intends to give. I should think that this was most particularly a case in which a remand is not appropriate because it seems to me that there is no likelihood of flight, and no danger to the community from the presence of the defendants at large pending the sentence.

MR. GOLD: Your Honor, may I be heard briefly in opposition?

THE COURT: Certainly.

MR. GOLD: Judge Bauman was very frank in his comments about the conduct of these defendants. He described it. It was introduced into evidence in this case. He described their conduct as the deliberate frustration of a murder prosecution. Mr. Chevigny tells us that now the defendants say we didn't know anyone would be killed. Unfortunately I have no information that leads me to conclude that they have in any way ceased their affiliation with the Jewish Defense League. And however worthy or unworthy those objectives might be, one never knows when those activities will lead to violence.

Secondly, with regard to the likelihood of flight, I don't have personal knowledge about the family backgrounds

of the defendants in the fire bombing case who actually did flee. Consequently I can't respond that the situation of these defendants is far different from the situation of those defendants.

THE COURT: What information have you got about who has fled in the way of defendants or witnesses?

MR. GOLD: Your Honor, it is my understanding that two of the defendants in the underlying fire bombing case did flee the country.

THE COURT: Who were they?

MR. GOLD: Mr. Zellerkraut, I believe is one, and I believe there's one other.

THE COURT: Who else was there?

MR. GOLD: Your Honor, I just can't specify at this time. I believe another one did as well. But certainly Mr. Zellerkraut did, and I am not in a position to disclose to your Honor what his family situation was.

THE COURT: I remember Judge Bauman was impressed--let me just back up. Judge Bauman committed the defendants on the civil contempt charge, isn't that right?

MR. GOLD: Correct.

THE COURT: Then there was the appeal to the Court of Appeals on the civil contempt charge.

MR. GOLD: That's correct.

THE COURT: Were these defendants incarcerated on the civil contempt charge all the time that that appeal was being heard?

MR. GOLD: Your Honor, my understanding of that is--

THE COURT: Is that right, Mr. Huss and Mr. Smilow?

DEFENDANT HUSS: Yes.

DEFENDANT SMILOW: Yes.

MR. GOLD: That's right.

THE COURT: So then there was the proceeding on the 27th of June, 1973, and criminal contempt proceedings were instituted shortly thereafter. Now Judge Bauman set bail, right?

MR. GOLD: That's correct.

THE COURT: Okay.

MR. GOLD: Of course at that time they were presumed to be innocent of the charges on which they have just been convicted. Consequently, in terms of one's motive to flee, the motive was not as extensive then as it clearly is now. So I don't think the fact that Judge Bauman deemed it appropriate to fix bail on June 27, 1973, at the time charges were about to be filed is dispositive of the question of whether or not there remains the likelihood to flee now that they have been convicted.

THE COURT: Well, how about the point of the security? Their parents.

MR. GOLD: Two parents face--

THE COURT: Homes are security for $50,000 bond.

MR. CHEVIGNY:: That certainly is extensive bail. I am not prepared to tell your Honor --

THE COURT: That bail was set by Judge Bauman. Now what do you say to that. Mr. Chevigny argues that the family ties are presumably strong enough to prevent the callous act of flight which would sacrifice the families' homes, and in one family home there is the father. Mr. Huss, does anybody live with your father?

MR. CHEVIGNY: His mother lives in the family home.

THE COURT: I thought you said your mother and father were separated.

DEFENDANT HUSS: That's right. I live with my father. My mother is in custody of the home.

THE COURT: She has the home?

DEFENDANT HUSS: That's right.

THE COURT: And who lives with her in the home?

DEFENDANT HUSS: My sister.

THE COURT: Your sister?

DEFENDANT HUSS: Yes, sir.

THE COURT: And then you have a brother 15. Who

does he live with, Mr. Huss?

DEFENDANT HUSS: My brother lives with myself and my father.

MR. GOLD: Your Honor, do I correctly understand that the fathers of both of these defendants are privately engaged in business? If that's the case, at the very least I would ask that if your Honor is inclined to fix a cash bail, that bail be fixed in the increased amount of $100,000.

THE COURT: Well, let's just take it one step at a time. We have the home in which Mr. Huss' mother resides, and the home in which Mr. Huss' 10-year old sister resides. That home is security for the $50,000 surety bond. That home is security to the bondsman, right?

MR. CHEVIGNY: Yes, it is. I am told by Mr. Huss' father that it is jointly held by him and his wife as far as ownership goes. That it would be a detriment to both of them, if the home were lost because it is jointly owned.

THE COURT: That's security to the bondsman, right?

MR. CHEVIGNY: Yes.

THE COURT: And then we have got the home of Mr. and Mrs. Smilow in which -- who lives in that home? Mr. and Mrs. Smilow?

DEFENDANT SMILOW: Yes.

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THE COURT: And you live there?

DEFENDANT SMILOW: And my brothers.

THE COURT: And both of your brothers?

DEFENDANT SMILOW: Yes.

MR. CHEVIGNY: Your Honor, I would like to say something.

THE COURT: Okay.

MR. CHEVIGNY: Of course, the defendants were presumed innocent in a technical sense but we all know from what happened today that apart from the procedural issues that we raised, their conviction was close to a foregone conclusion. It was not like other criminal cases. They could have fled if they had wished to. They made an issue of principle about this, and their principle was not hurting, not injuring others who were their associates. Now they were wrong as a matter of law about that. You so charged the jury, and the jury so found. But I can't see any reason to believe that the kind of people who wouldn't testify against their fellow members in an organization, would make that much of a point of honor of something, could conceivably run away to some foreign country and ruin the lives of their parents. They made that issue partly on an issue of religion. Their parents are not the same religion. It seems to me totally illogical to me that these are the sorts of persons who would

go to jail or refuse to testify against other members of their organization, would then flee and wreck the lives of their parents and brothers and sisters. I find that incredible even to sugest.

THE COURT: I know Judge Bauman set bail, but when he was talking about the civil contempt -- and I don't--

MR. CHEVIGNY: I think he said--

THE COURT: He was concerned about the possibility of flight, and he remarked about the possibility of flight to Israel in this kind of a situation, and let's get that reference clear.

MR. GOLD: Your Honor, I can furnish it to you. It begins at page 261 of the transcript.

MR. CHEVIGNY: 271.

MR. GOLD: I have it at 261. That's where he begins discussing how Elbogen was--

MR. CHEVIGNY: Oh, I have it.

I am told and I believe it to be true that Mr. Elbogen and Mr. Zellerkraut didn't jump bail. They were-- if it makes any difference. They were not subpoenaed or in the position of these defendants at the time that they went to Israel.

THE COURT: What Mr. Jaffe said at that point, the government lawyer is "We have at least three witnesses

for the government who are not available to the government. I know that two of them are in Israel. One of those witnesses was served with a subpoena and ailed to comply with the order and has not appeared in the United States. Another one of those witnesses is some place in Israel but is one step ahead of the people who are trying to serve him. In addition, Elbogen, who was another witness that the witness sought to obtaink is nowhere to be found. So there is no indication that any of those three people jumped bail. They fled at the outset.

MR. GOLD: Your Honor, I don't mean to suggest--

THE COURT: And the government did I guess suggest the 50,000 cash or surety bond. At least that's what Mr. Jaffe was talking about there in the event bail might be appropriate. And Judge Bauman at page 263 talks about the incentive to flee because of being a defendant that was not present before. Judge Bauman set bail here, did he?

MR. CHEVIGNY: The next page your Honor.

THE COURT: This is the portion of the transcript. We are not talking about civil contempt. We are talking about bail for the criminal contempt, right?

MR. CHEVIGNY: Yes, sir.

THE COURT: Could I see page 264 of the minutes. What would be the timing of appeal?

MR. CHEVIGNY: Well, there is ten days to file the notice and the 40 days to complete the record. I take it that I would do it within that time. It is a 50-day total overall from the time of sentence. But of course the issue of bail on appeal is a somewhat different issue from this one. Frankly I am a little surprised by this. I had expected these defendants --

THE COURT: Who would be responsible? Suppose that-- who does the defendant apply to for bail after a sentence, the district court or --

MR. CHEVIGNY: Both. First you -- well, either. First to you and then to the Court of Appeals if you should deny it.

THE COURT: Frankly I think there are some serious conflicting factors here. First of all, I think that the time of this whole program has been extensive. The criminal trial in the other matter was in June of '73. And the criminal contempt proceedings were initiated promptly but for a variety of reasons the criminal contempt trial has been delayed over a year. It was nobody's fault but it still happened. There was a change of counsel for the defendants, and then discovery motions were made by the new counsel and so forth.

So we are in July of '74 getting this tried

instead of July of '73 and apparently it was impossible to try it in July of '73, but still it means that this whole proceeding, which should have gone promptly on trial, has been quite extensive in terms of time.

Secondly, I don't see any real basis for appeal. That is certainly not my prerogative to decide what the Court of Appeals would do, but it seems to me that this is an unusual case. The Court of Appeals had the issues before it in the civil contempt matter and held that there was no just cause for refusing to answer, and it would be surprising to me if the Court of Appeals held something different now.

It is possible but for the sake of my view of the bail situation, I have got to regard the appeal as a very, very unlikely thing.

Secondly, as far as the sentence, I want to hear the submissions of the defendants and their counsel and I would want to consider very, very carefully all information in the pre-sentence report. But it would seem to me extremely unlikely that a prison sentence would not be imposed.

MR. CHEVIGNY: I agree.

THE COURT: Now, I haven't even come to the risk of flight yet, but as far as the risk of flight, I feel that the court at this juncture should not run any appreciable

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of flight. The criminal case was frustrated and if for any reason these defendants or even one of them should escape the lawful processes of this court, it would simply be a mockery, and nothing in this world can ever be made absolutely certain and bail is never certain but I think it should be held to an absolute minimum risk in this case. This is a case where I think special precautions are warranted if the court's authority is to be enforced.

On the other hand, Mr. Chevigny, I appreciate your argument about the adequacies of the bail. I think it would be a very callous act on the part of either of these men to flee and subject their homes to seizure, and it is difficult to think that anyone would do that.

Let me peruse the statute a minute and see what I can find on a couple of points.

(Pause)

THE COURT: I am going to order the defendants remanded for the following reasons:

I believe under the terms of Section 3148 that an appeal in this action under the present circumstances is basically frivolous. I would not go so far as to say it was taken for delya. I don't impute any such motives to you Mr. Chevigny under any circumstances, but to me it is a matter or it would be a matter of form and despite all good

intentions it really would be frivolous.

And that, as I understand it, is in itself sufficien cause for directing remand. The provision is in the statute "If such a risk of flight or danger is believed to exist or ifit appears that an appeal is frivolous or taken for delay, the person may be ordered detained."

So my view of the lack of substance of an appeal here is sufficient reason in itself for ordering remand or detention immediately.

Added to that, I repeat that this is a situation where I think the court should not run any appreciable risk of flight because this is the last remaining shred of legal enforcement to a serious criminal prosecution which was begun as a result of the fire bombings of the two agencies and the death of the secretary back in January, 1972. This is all that remains, and the authority of the court cannot be flouted, and no appreciate risk can be taken of flouting that authority by taking, by running any substantial or appreciable chance that either of these defendants will flee.

I recognize that $50,000 bail has been given for each of these defendants in the form of a surety bond, and that those bonds are securities for homes, but these defendants have run risks, taken positions which might appear completely irrational to many of us, and I cannot exclude

the possibility that another irrational act of some kind might occur.

Finally, as I have already stated, the procedure we are involved in has already been extended too long, and with the lack of substance as I view it in an appeal, I think it is time to certain at least make sure that the court's authority is enforced and that there is no possibility that there is any flight or avoidance of the court's authority.

A prison term is a virtual certainty although the amount of the prison term has to be carefully weighed in view of all the circumstances that will be presented to me in September.

As far as the convenience of the defendants in connection with their school schedule, that is a matter I cannot take into account. They have been at liberty a full year before this trial. They have been at liberty a full year since the contempt proceeding was initiated and before the case even got to trial. They have had more time at liberty than would normally be expected. Consequently, the main objective we all have to take care of now is to see that the jury's verdict, and the processes of the court are enforced and in view of that I will direct their immediate remand.

Court is adjourned.

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WITNESS INDEX

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John Gross	22			
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EXHIBIT INDEX

Government	Identification	In Evidence
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1A, 1B, 1C, 1D		22
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UNITED STATES OF AMERICA
v.
RICHARD HUSS and
JEFFREY H. SMILOW

73 Cr. Misc. 24
73 Cr. Misc. 25

July 31, 1974,
1 P.M.

Before:

Hon. Thomas P. Griesa,
District Judge.

Present:

Robert Gold, Assistant U.S. Attorney,
For the Government.

Paul Chevigny, Esq.,
For the Defendants.

--

MR. GOLD: Government ready, your Honor.

MR. CHEVIGNY: Defendants ready.

THE COURT: Mr. Gold, do you have any statement?

MR. GOLD: Your Honor, it is my understanding that Mr. Chevigny has statements to make on behalf of the defendants. With your Honor's permission, I would like to be heard at the conclusion of his remarks.

THE COURT: All right.

Mr. Chevigny?

MR. CHEVIGNY: Thank you, your Honor.

Your Honor, I know from talking to my clients that you received the Probation report, which is undoubtedly

very thorough, and that you have received letters and other communications from the community about these defendants. I don't need to tell you that they are not the usual criminal defendants. They are very young men. Mr. Huss was 16 and Mr. Smilow was 17 at the time the events here occurred. They do not have any criminal past. Their sole connection was with a political group, the Jewish Defense League.

They have been defiant of the rules of this court, of the orders of this court, in part because they are truthful. You heard Mr. Smilow testify. He testified to things that were said to him by others, he testified in a manner that I think is characteristic of the truth, that he took the action that he had taken here.

They are young men who are educating themselves. Were it not for the events that occurred in this case they would have a clear record, and they have a promising future and something to contribute as working members of society. I think that much must be clear to your Honor.

Now, what happened here was a very tragic accident. The defendants did not understand the enormity of the crime that was being committed. They did not suppose that there would be a fire bomb. Of course people are responsible for the consequences of their acts that they commit, even

if those acts are not deliberate. But here is a case where the events which occurred are tangential [illegible], the criminal intent of the defendants.

Your Honor had occasion [illegible] when we talked about remanding the defendants [illegible] trial to comment that this was the last shred of a hold that this court had on the underlying events arising out of the indictment of Messrs. Cohen and Davis and others. If there is any feeling that the punishment for that crime should spill over onto these defendants, I would like to point out that, dealing solely with the punishment for those crimes, I think the record of these defendants and the Probation report would show that they are classically good risks for probation. If it is desired to punish for the underlying crime, I would like to point out that --

THE COURT: Let's clear that up. You just now started talking about the underlying crime and you started saying that they did not understand that there would be certain consequences that occurred.

These men have not been convicted of the underlying crime. They are not going to be sentenced for the underlying crime. I think you, in a way, are treading in deep water or beginning to tread in deep water when you begin, as you did, to describe the events of the underlying crime,

to try to show what they did or did not do.

I don't mean to cut you off, but if you start telling me about the degree of responsibility for the underlying crime, I might find it necessary to let the government talk about its version of the underlying crime, and I really think that that gets us into something we cannot do in the present posture of the case.

So I will assure you of something which is absolutely obvious, that these men have not been convicted of the underlying crime and they won't be sentenced for it. That's that.

MR. CHEVIGNY: Thank you, your Honor. I will go on to another point I wanted to raise. I don't have a great deal to say on this point. I would like to say that because of the posture in which this case fell out, these defendants are suffering principally for the sins of others. It is true they were called as witnesses, but the government had an informant in this case, who was Mr. Seigel, and Mr. Seigel carried a heavy burden of guilt with relation to the events that occurred in the underlying crime, and because of his cleverness, because of his understanding of what was going on when others did not understand, he was able to, in the case which went up to the Court of Appeals on the civil contempt, he was able to escape guilt for the charge of contempt because

of motions that had been made on his behalf by his lawyers and because of things that he himself had done.

He was originally the government's chief witness and he had been a government informer throughout the entire proceedings, I mean not in legal proceedings but throughout the entire transaction. And in fact I would like to say that it seems to me that these young men have been called before this court and subjected to these penalties in effect because of the cleverness of Mr. Seigel, because he was able to make use of the government in a very special, ingenious kind of way and to escape testifying, and in effect even because he was able to use the cover of his government informer status to enable him to participate in the crime and to escape all punishment for it, to obtain immunity for it and to ultimately avoid testifying. It came down on these young boys.

And it seems to me that it would be extraordinary irony to let the government's chief witness, who could have given evidence here, escape for procedural reasons, if the punishment were to come down on these boys because of Mr. Seigel's participation in the crime and because of the posture that he was able to put the case in.

But I think, your Honor, your Honor has read the reports and understands what promising young men these are

with relation to the usual probation situation and I recognize that the big problem in your mind must be with relation to the deterrent effect. A criminal contempt is almost entirely a deterrent crime.

The punishment is meted out for a criminal contempt primarily for the purpose of suggesting to others that they may not refuse to testify. And so it may be, with these defendants, that your Honor may feel that it is necessary to impose a severe sentence in order to deter others, and I would like to suggest why that is not appropriate, why this case is not like other cases involving a refusal of witnesses to answer.

What was done here was done for political reasons, because of solidarity with friends, and for religious reasons. I don't suggest that that makes it not a crime, but it affects the relationship of this case to other contempt cases and to other witnesses who may in the future refuse to testify.

It was not through fear or intimidation or any of the usual means that these young men were prevented from testifying. It was entirely a matter of principle. It is not the sort of thing which is the subject of coercion. Other witnesses who do such things as a matter of principle will not be coerced any more than these witnesses are.

Your Honor's releasing them would not suggest to others that because they are subjected to intimidation or fear they may refuse to answer. This is a specialized type of case, this case in which they refuse to answer because of religious and political principles, and in accordance with that I would suggest that it hasn't any deterrent effect or it has a very minimal deterrent effect, on other witnesses.

In the light of the fact that --

THE COURT: Why doesn't it have almost a broader need for deterrence if you have a ground for refusal to testify which is of some broad significance, and there is a ground asserted here of refusal for religious reasons to testify? Now, if that were allowed to go without some meaningful punishment, that would perhaps have broader implications, would it not, than some special problem relating to intimidation that relates solely to the individual case? And this is really, is it not, a matter of a general problem of law enforcement?

MR. CHEVIGNY: I think not, your Honor. I think that persons who do things for issues of principle are really uncoercible. Your Honor could sentence them to a long sentence but it would not coerce them nor coerce other witnesses who take a similar position.

In addition, when you raise the general problem of law enforcement, I have to say that that relates back to the earlier point that I raised, which is that the case is cast in an extraordinary mold because the effect of this is that those who might have had some knowledge of it but were not the government's appointed witnesses originally are to be punished whereas a person who was deeply involved in the crime at the same time, the government informer, has gone free; and if one speaks of a general problem of law enforcement, I think it would be detrimental to the atmosphere of law enforcement to punish these defendants entirely when the person principally responsible and who in fact was accepted as a government informer has succeeded in escaping.

I would like to emphasize once more that the usual rehabilitative effects that a prison sentence is supposed to have with relation to defendants I venture to say has no relation with respect to these defendants. There is nothing that a prison sentence can do for them, and I suggest that their incarceration would be futile for them and would be futile for the United States.

THE COURT: Do you make any argument or do you make any request for the application of the youthful offender provisions?

MR. CHEVIGNY: Yes, your Honor. I would think that

the youthful offender provisions are appropriate, especially to 5010(a), Section 5010(a), of Title 18. I would urge your Honor to suspend the imposition of sentence and place the defendants on probation.

THE COURT: Now, if I did not feel that I could suspend the imposition or discussion of a sentence and deal solely on the basis of probation, my next question to you is, do you argue for or do you make any request for the application of the provisions in 5010(b) or any other part of the youth offender --

MR. CHEVIGNY: Yes, I would, your Honor, because of my view that the federal prison authorities would take the view that a long incarceration of them would not be appropriate. Accordingly I think that they would be quickly released.

THE COURT: Have you got 5010(b) before you?

MR. CHEVIGNY: I have..

THE COURT: Okay. Does 5010(b) really apply in a case like this? 5010(b) says:

"If the court shall find that a convicted person is a youth offender and the offense is punishable by imprisonment under applicable provisions of law other than this sub-section, the court may in lieu of the penalty of imprisonment otherwise provided by law sentence the youth

offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the division as provided in Section 5017(c)."

And then 5017(c) says:

"A youth offender committed under Section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction."

The first question I ask you is a question of law. There is no specific term of imprisonment or range of terms of imprisonment provided for criminal contempt. But I suppose you would argue, and I think that probably would be right, that nevertheless 5010(b) could apply because imprisonment certainly is as a matter of law possible; it can be the sentence in a criminal contempt case.

MR. CHEVIGNY: It would be Catch 22. Because if you could put them in prison, and not because they couldn't be sentenced under 5010(b), then it would automatically become true that they could be sentenced under 5010(b), if you follow me.

THE COURT: Would you argue that if I could not use probation entirely you would request a commitment under 5010(b) and 5017(c) under which they could be held up to four

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years, right?

MR. CHEVIGNY: Yes, your Honor.

THE COURT: I don't mean to put you on that kind of a spot. Your argument would be that the federal authorities -- you would foresee them keeping these men a lot less than four years.

MR. CHEVIGNY: Yes. I also urge your Honor that prisons contain notoriously bad company and notorious schools for crime, and I think to send young men of this background to prison would run the risk of worsening the situation and I would most strongly urge you to consider probation because of the age, the posture of the case with relation to other persons, and their background.

THE COURT: Let's not go too far on calling the prisons schools for crime. I think I have visited a few prisons recently and I think that is not quite so. But, anyway, I get your point.

Do you have anything else, Mr. Chevigny?

MR. CHEVIGNY: Not at this point. If Mr. Gold should raise something that I haven't thought of, I would like an opportunity to be heard.

THE COURT: Mr. Huss, do you have any statement you wish to make?

DEFENDANT HUSS: No, I don't, your Honor.

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THE COURT: All right. Mr. Smilow, do you have any statement you wish to make?

DEFENDANT SMILOW: No, sir.

THE COURT: All right. Mr. Gold?

MR. GOLD: Thank you, your Honor. I am troubled by something Mr. Chevigny said. He focused some of his remarks on what has become of Mr. Seigel. What he failed to state and what is the undisputed fact in this case is that although Mr. Seigel did get immunity, each of these defendants also got immunity. Each of these defendants told Judge Bauman he understood what having been granted immunity meant, and nonetheless each repeatedly refused to obey Judge Bauman's orders.

Mr. Chevigny also used the phrase "The enormity of the crime." In using that phrase his remarks were focused narrowly on the fire bombing. He did not refer to the enormity of the crime of which these defendants now stand convicted.

Judge Bauman, on the other hand, had some very definite views on the enormity of that crime in a criminal contempt and he said, reading from page 258 of the trial transcript, a portion of which was received in evidence in this case, marked Government's Exhibit 3, he said, "It is inconceivable to me that anybody would be thinking of

proceeding in a manner that would limit punishment to six months. I therefore want every letter observed. I want the case to proceed to a jury trial and I want the judge, whoever he is, to have in mind my views, as I have expressed it previously this morning, of the seriousness with which I view the frustration of a murder prosecution. People may do that, but the law will make them pay."

Now, as your Honor knows, following the refusal of these two defendants to testify at the underlying fire bombing trial, three counts in that indictment were dismissed. However, two counts presently remain open, and the United States Attorney's office represents that it is prepared to go forward with that prosecution should the necesssary witnesses materialize.

And in that regard I would say that what your Honor does here this morning, despite what Mr. Chevigny represents, may well have terribly significant impact on bringing those named defendants to justice.

THE COURT: I want to be clear. The original indictment was three counts?

MR. GOLD: The original indictment was five counts, including conspiracy. Counts 4 and 5 that now remain open charge criminal possession of unlawful explosive devices pursuant to --

THE COURT: Who are those counts directed against?

MR. GOLD: Sheldon Davis, Stuart Cohen and Sheldon Seigel in count 5 and the same defendants in count 4, with the addition of Jerome Zellerkraut, also known as Jerry Zeller. According to my information he is presently in Israel.

THE COURT: Give me that again.

MR. GOLD: Count 4 charges Sheldon Davis, Stuart Cohen, Sheldon Seigel who has immunity as I understand it, and Jerome Zellerkraut, also known as Jerry Zeller, and it is my information that he has fled the country and is now in Israel.

Count 5 charges each of those defendants with the exception of Mr. Zellerkraut.

THE COURT: What has happened to counts 1 through 3?

MR. GOLD: They were dismissed by Judge Bauman for failure to prosecute as a result of a lack of witnesses at the trial.

THE COURT: Do you know why the --

MR. GOLD: Two counts remain open? That was Judge Bauman's order and I am not clear on the narrow reason for that rule.

THE COURT: Is there any possibility of the government prosecuting counts 4 and 5 without the testimony

of Mr. Huss and Mr. Smilow?

MR. GOLD: It is my understanding there is a possibility that, should another witness materialize who is presently out of the country, that case can be brought and prosecuted.

THE COURT: But right now, I take it, there aren't witnesses presently available on counts 4 and 5, right?

MR. GOLD: Correct.

THE COURT: Do you have anything further?

MR. GOLD: No.

THE COURT: Mr. Chevigny, do you have anything further?

MR. CHEVIGNY: No. I think I've said enough, your Honor.

THE COURT: Let me make a short statement. Both the defendant Huss and the defendant Smilow have been convicted after a jury trial on the basis of a jury verdict of the crime of criminal contempt. That crime was committed by both the defendants in June of 1973 before Judge Bauman. The crime was their refusal despite patient warnings by Judge Bauman, despite the clearest possible legal rulings by Judge Bauman, despite the affirmance of those legal rulings by the Court of Appeals in connection with the civil contempt proceedings.

Judge Bauman specifically warned each defendant

that his refusal to purge himself of the contempt then and there would subject him to a trial for criminal contempt, and Judge Bauman warned that the penalty would undoubtly be a prison term of more than six months, and therefore Judge Bauman set in motion the judicial mechanism under which a jury trial was held so that the court would have the power to impose a sentence of more than six months.

The jury trial has been held and the sentencing matter is before me.

Obviously my sentence is not predetermined by what Judge Bauman did or said, but the facts of what went on before Judge Bauman, the conduct of these men, is of course the case on which my sentence must be based.

I stated earlier, and I think it is very important to have in mind, that any sentencing of mine handed down today is not a sentencing for the underlying crime of fire bombing in connection with the events of January, 1972, at the Columbia Artists office and the Sol Hurok office. That was the underlying crime which Judge Bauman was attempting to try and it was the criminal trial in which Mr. Huss and Mr. Smilow were called to testify.

But I must start my consideration with the fact that Judge Bauman was attempting to try not a routine criminal case, if any criminal case could be called routine, but one

of aggravated seriousness, involving a terrifying type of crime and the death of a perfectly innocent young woman.

So it was of great importance for the government to prosecute that crime, to attempt to bring those responsible to justice, and that's what the government was attempting to do, and the court was attempting to try that case, a very important matter indeed.

Mr. Huss and Mr. Smilow each were granted immunity from prosecution of any personal responsibility they may have had in connection with those events, and following the grant of immunity it was their duty to testify and assist the court and the jury to find out the truth about what went on in connection with those serious matters of January, 1972.

Mr. Huss and Mr. Smilow were called upon to tell the truth in order to assist the carrying out of the administration of justice in this country, relating to a very serious problem and crime. They refused to do so and therefore committed a crime themselves, as the jury has found.

The religious grounds which they asserted for their refusal and other grounds they also asserted, those matters have been discussed with great thoroughness by Judge Bauman, by the Court of Appeals, and the legal rulings have been conclusively laid down that those grounds were not valid grounds for refusing to do their duty as citizens and

to tell the truth in this court of law.

I have received a great number of letters from people who are anxious to assist Mr. Huss and Mr. Smilow and to urge that they be treated with leniency at the time of this sentence. Many of those letters urge strenuously that these men had a right on religious grounds to refuse to testify. I mean no disrespect to the authors of those letters, but frankly I am surprised about the misconception which they seem to display. I cannot imagine in this country any valid religious grounds for refusing to testify against someone indicted for a crime, whether it is asserted by a person of the Jewish faith or a person of the Catholic faith or Protestant or whatever. That kind of thing simply cannot be permitted if we are to protect our citizens against serious crimes.

I have discussed with Mr. Chevigny the question of whether the provisions of the Federal Youth Corrections Act should be applied. 18 USC, Section 5006 defines a youthful offender as a person under the age of 22 years at the time of conviction. Mr. Smilow is now 19. Mr. Huss is now 18. So application of that statute must be considered. Mr. Chevigny on behalf of these defendants asks for it to be considered.

However, upon consideration I find that treatment

or probation under that statute is not appropriate. Specifically I find, with regard to 18 USC, 5010(a), that both Mr. Huss and Mr. Smilow require commitment and I find that it would be inappropriate to suspend the imposition or execution of sentence and place either of these men on probation.

With respect to Sections 5010(b) and 5010(c), providing for treatment and supervision in lieu of imprisonment, I specifically find that because of the nature of the offense neither Mr. Huss nor Mr. Smilow would derive benefit from the treatment contemplated under these provisions, nor would such treatment be appropriate.

The materials which have been submitted to me do not indicate that there is any real necessity for rehabilitation as far as the events with which we are involved here. Undoubtedly this is a unique situation. I have no reason whatever to believe that either of these young men will be involved in this type of problem again. It is obviously unique and not subject to repetition.

It seems to me that the purpose of sentence and punishment in this case is to enforce the law, to vindicate the power of the court, to require citizens to perform this important duty of testifying. That is the beginning and the end of the purpose of sentence and punishment in this case, and those purposes are not, in my view, served by the

application of the treatment and supervision provisions of the Federal Youth Corrections Act.

Let me say one other thing as a prelude. I repeat that the sentence should not be viewed by me or anybody else as being imposed for the underlying crime. This sentence cannot be viewed as a means of punishment for that crime. This sentence is imposed solely for the criminal contempt committed.

Under all the circumstances, I believe that the following sentences should be imposed and I hereby impose them:

The defendant Huss is sentenced to a term of imprisonment for one year and the defendant Smilow will be sentenced to a term of imprisonment of one year.

I am willing to discuss surrender dates if there is any desire to request anything particular in that regard, Mr. Chevigny.

I am sure you are well aware of this, but of course I will formally advise you, each of you, that you have the right to appeal. If you cannot afford counsel, the court will entertain an application to appoint counsel for you. I think that is true of both Mr. Huss and Mr. Smilow.

All right, Mr. Chevigny.

MR. CHEVIGNY: It is Mr. Smilow's birthday tomorrow. If they could go in on Monday, it would make the families happy. I ask your Honor for that much.

THE COURT: All right.

MR. GOLD: Your Honor, I would like to state that I obviously have no objection.

THE COURT: I don't think that is the slightest problem.

The surrender date will be fixed. Each defendant will be directed to surrender at 10 A.M., August 5th.

MR. CHEVIGNY: Thank you. Would your Honor entertain an application for bail pending appeal at this time or would you prefer to have it on papers?

THE COURT: I think we ought to settle it now.

MR. CHEVIGNY: All right.

THE COURT: And this brings us back to some of the considerations we were involved in earlier.

MR. CHEVIGNY: Yes, your Honor.

THE COURT: Just to recap, at the time of the jury verdict I ordered their immediate remand and revoked bail because I felt that there was no valid ground for appeal here, the matter already having been up to the Court of Appeals during this civil contempt proceeding. As you know, I called a hearing subsequently and on my own motion reheard

the matter and felt that I had perhaps misconstrued the bail statute and that at that particular juncture prior to sentencing I could not remand simply because of the lack of merit in an appeal. We are at a different procedural juncture now and I want to look at the statute again.

MR. CHEVIGNY: 3148 of 18 USC, your Honor.

THE COURT: What?

MR. CHEVIGNY: 3148.

THE COURT: 3148.

(Pause)

THE COURT: I really would feel constrained at this point to apply the provision of 3148 about the appeal being frivolous or taken for delay, and I would order the surrender on August 5th. I have in mind all the considerations we went into before about the family connections and so forth. I have that very vividly in mind. But from my own viewpoint, the District Court, and considering the particular record here, the fact that the matter has been up to the Court of Appeals, as I said, I think that there is really nothing of substance left for an appeal. So I would direct that each defendant surrender on Monday, August 5th, and I would not wish to stay that or allow bail pending an appeal.

MR. CHEVIGNY: Under Rule 9(b) of the Rules of

Appellate Procedure it provides for the court to state its reasons in writing. I have had some confusion in appealing these things. I would simply ask your Honor at some time before or on August 5th to state your reasons, however briefly, in writing, even if in one sentence. If your Honor would simply state that your reason is that you find the appeal to be frivolous, or whatever it is your Honor wishes to say, if you would state it in writing--

THE COURT: Direct my attention to that, please.

MR. CHEVIGNY: Rule 9(b) of the Rules of Appellate Procedure, the second sentence.

THE COURT: All right. I am glad you called my attention to that.

Let me just get your specific application. What is it?

MR. CHEVIGNY: My application would be for bail pending appeal.

THE COURT: I will deny that application for the reasons stated on the record and I will get out a short memorandum this afternoon.

MR. CHEVIGNY: I don't ask your Honor to go to that much trouble. If you could endorse something, I think that would be sufficient.

THE COURT: I don't have anything to endorse. I will

get out a short memorandum this afternoon. I think that's all I can do.

MR. CHEVIGNY: My last request is that defendants have had some trouble in the West Street jail in relation to kosher food, which apparently is available but isn't given without an order of the court.

THE COURT: That will be ordered.

MR. CHEVIGNY: I would ask, your Honor, if you would accept my submission of an order to you, a written order, that kosher food be given.

THE COURT: Certainly.

MR. CHEVIGNY: Thank you.

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GOVERNMENT'S TRIAL EXHIBITS

GOV'T
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

UNITED STATES OF AMERICA

vs.

STUART COHEN, SHELDON DAVIS and SHELDON SEIGEL.

72 Cr. 715
72 Cr. 775

Before: HON. ARNOLD BAUMAN, D.J.

New York, June 8, 1973;
10.30 A.M.

Trial resumed.

MR. SMITH: The government recalls Mr. Huss.

RICHARD HUSS, called as a witness by the Government, duly affirmed by the Clerk of the Court, testified as follows:

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U. S. DIST. COURT
S. D. OF N. Y.
1B

THE COURT: Denied.

All right. Go ahead.

DIRECT EXAMINATION

BY MR. JAFFE:

xx Q Would you state and spell your name, please?

A Richard Huss.

Q Will you tell us where you live?

A 5 Staten Island Boulevard.

Q Would you tell us your age?

A I respectfully decline to answer this series of questions on the grounds that my testimony may tend to incriminate me. Also it is my understanding of the Jewish Law that I am prohibited from testifying against another Jew in a non-Jewish tribunal and on the grounds that any contrary interpretation of Jewish Law made binding on me is itself a further violation of basic Jewish Law.

MR. JAFFE: Your Honor, at this time we would hand up to the Court an application we attempted to file last week with regard to immunity for Mr. Huss.

I will hand a copy of that application to Mr.

Miller, and I will hand to the Court a letter, the original of a letter from Henry E. Petersen, Assistant Attorney General, authorizing the United States Attorney to make this application.

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U. S. DIST. COURT
S. D. OF N. Y.
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BY MR. JAFFE:

Q Mr. Huss, directing your attention to January 26, 1972, specifically, to the morning of that day, did you see the defendants Stuart Cohen and Sheldon Davis on that day?

THE COURT: Before you answer that question, Mr. Huss, I want to explain to you that I have just signed an order which confers immunity on you, and which prevents the use of anything you say against you.

I [illegible] you a moment or as much time as you like, Mr. Huss, to talk to your lawyer so that he c[illegible]

explain to you the legal significance of what it is I have done in signing this order I have just signed.

You may step down.

MR. JAFFE: Your Honor, before the witness steps down, would the Court also admonish the witness that it is the Court's opinion that the other basis stated for refusal to answer, specifically the religious grounds, is not a valid basis and that he consult about that?

THE COURT: Yes, Mr. Huss, your lawyer knows the case of United States v. Smilow, I have no doubt, but another Judge of this Court has ruled upon that same objection in the case of Mr. Smilow, and has held it to be not a valid ground for refusal to answer.

The substance of what I have said is that I agree with the ruling of that Judge, Judge Weinfeld by name, with respect to the claim based upon religious scruples, and advise you that it is not a proper basis on which you may refuse to answer.

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THE COURT: The objection based on religious grounds is overruled.

T3 MR. MILLER: I except.

THE COURT: I would like you to talk to your client, please, explain to him -- you may step down, Mr. Huss -- the significance of the order I have just signed.

MR. JAFFE: Shall we proceed with Mr. Allow?

THE COURT: We will take a five-minute recess because I want counsel to have an opportunity to talk to his client.

(Recess.)

EXAMINATION BY MR. JAFFE:

Q Mr. Huss, directing your attention to the morning of January 26, 1972, did you see Sheldon Davis on that morning?

A I respectfully decline to answer this series of questions on the grounds that it is my understanding of Jewish law I am prohibited from testifying against another Jew in a non-Jewish tribunal and on the grounds

that any contrary interpretation of Jewish law made against me is a further violation of the Jewish law.

THE COURT: Do you understand I have overruled that objection?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

Q Mr. Huss, on the morning of January 26, 1972, did you drive in a car with Sheldon Davis and other people from Brooklyn into Manhattan?

A I respectfully decline to answer --

THE COURT: You may say same declination.

THE WITNESS: Yes, your Honor.

THE COURT: You decline to answer on the same ground?

THE WITNESS: Yes, sir.

MR. JAFFE: Would you order the witness to answer that?

THE COURT: I order you to answer the question, Mr. Witness.

A Same declination.

Q Mr. Huss, on the morning of January 26, 1972, did you have a discussion with Mr. Davis and other individuals concerning the [illegible] at the premises of either Nuroc Concrete, Incorporated

or Columbia Management Artists, Incorporated?

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled.

You may answer.

A Same declination.

THE COURT: I order you to answer.

A Same declination.

Q Mr. Huss, on the morning of January 26, 1972, did you go with an individual named Jerome Zellerbraut, also known as Jerry Zeller, to the offices of Nunce Concerts and there place an attache case and ignite it?

THE COURT: Go ahead.

Q Would you answer that question, Mr. Huss?

A Same declination.

THE COURT: I order you to answer, Mr. Huss.

A Same declination.

Q [illegible] at any time on the morning of January 26, 1972, in the company of Sheldon Davis, Jerome Zellerbraut also known as Jerry Zeller, Murray Elbogin and an individual named Murray Elbogin?

A Same declination.

THE COURT: Overruled.

You may answer.

A Same declination.

THE COURT: I order you to answer, Mr. Huss.

A Same declination.

Q Mr. Huss, prior to January 26, 1972, within a period of time from about two weeks before that date, that is, from two weeks before January 26, 1972, through January 26, 1972, did you have any discussions with Sheldon Davis or Stuart Cohen or with the individuals Murray Elgoban, Jeffrey Smilow or Jerome Zallerkraut concerning placement of any attach[illegible] or incendiary devices at either Harco Corporation, I.[illegible], or Columbia Artists Management?

THE COURT: I understand that. I don't regard this as a charade at all. He is asking questions that bear on the allegations of the indictment. The witness has consistently refused to answer and is heading in the direction of a contempt, and I shall deal with that at the appropriate time.

THE COURT: You may answer.

A Same declination.

THE COURT: I order you to answer.

A Same declination.

THE COURT: I don't really see much point in going on.

MR. JAFFE: We were going to inquire whether it was his intention to give the same declination if other questions were put to the witness.

THE COURT: You may answer that.

THE WITNESS: Yes.

MR. JAFFE: At this time we would ask that the Court make the finding that Mr. Russo is in contempt of this Court and that he be remanded to the custody of the Metropolitan Correctional until such time during this proceeding that he be recalled and give testimony before this Court.

THE COURT: Before you say anything -- I will hear you, of course -- Mr. Russo, I find you in contempt of this Court. There are two kinds of contempt that I want to tell you about.

One is civil contempt, which provides for your incarceration during the course of this proceeding but [illegible] the keys to the prison with you in that if you decide to answer at any time you will be released.

The second kind of contempt is a criminal contempt which does not look for answers but is meant as

[illegible]ishment for your contemptuous conduct in refusing to [illegible] questions.

I instruct you, sir, that a civil contempt does [illegible].

I find you guilty in contempt of court.

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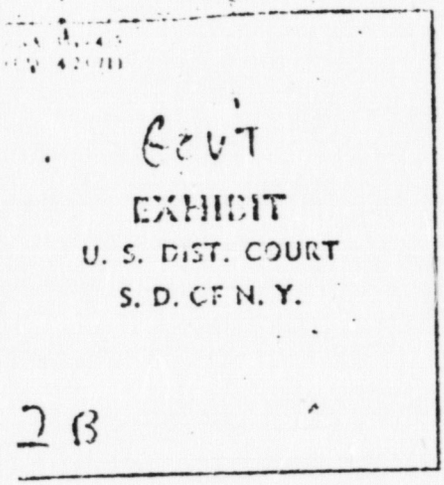
U. S. DIST. COURT
S. D. OF N. Y.
2A

xx

JEFFREY SHILOW, called as a witness by the Government, being affirmed, testified as follows:



DIRECT EXAMINATION

BY MR. JAFFE:

Q Mr. Smilow, would you tell us your age, sir?

A 18.

Q I don't hear you.

A 18.

THE COURT: He said 18.

BY MR. JAFFE:

Q Mr. Smilow, directing your attention to January 26, 1972, [illegible] on that day during the morning, see Sheldon [illegible] or Stuart Cohen?

A I refuse to answer on the ground that to require me to respond to the question would violate my Constitutional right of freedom of worship as a committed and observant Jew under the First Amendment to the United States Constitution and that to compel me to answer said question would violate my right of freedom of worship as a committed and observant Jew in that under traditional Jewish Law I didn't testify in any case where I am to receive an advantage or benefit because of my testimony against individuals.

I refuse to answer the question on the ground that I presently am charged with committing on January 26, 1972 at about 9:25 a.m., at 165 West 57th Street, New York, a crime of arson.

I refuse to answer on the ground that to require me to respond to the question would violate my right to [illegible] of the United States Constitution.

I respectfully refuse to testify against myself. I further refuse to testify on the basis that the Government obtained information illegally by allowing a co-defendant to act as an informant and to participate in taped conversations with me.

I further respectfully refuse to answer on the basis that I have already been put in jeopardy for the same proceeding and I have been already punished although that proceeding was dismissed.

MR. JAFFE: With regard to the witness' refusal to answer on the basis that he refuses to testify against himself, the Government at this time makes application to grant immunity to the witness. We hand up to the Court the original application and copies of the original letters and we hand a copy of the immunity application to his attorney.

MR. SLOTNICK: May defense counsel have a copy of that, your Honor.

MR. JAFFE: I will hand a copy to defense counsel so they both may take a look at that, your Honor.

MR. SLOTNICK: Thank you, Mr. Jaffe.

THE COURT: There is a blank in the date of filing in the order...

MR. JAFFE: I will [illegible], your Honor.

THE COURT: On may 31st?

MR. JAFFE: That's correct.

THE COURT: Mr. Smilow, I have just signed an order that confers upon you immunity against the use of anything that you are required to testify to in this courtroom. Do you understand that?

THE WITNESS: I understand.

THE COURT: Do you want a reasonable time to talk to your lawyer about the significance of the order I have just signed?

A No.

THE COURT: The witness says no. Go ahead.

MR. BLUMRICH: Your Honor, for the record, my silence should not be an indication of approval other than just I am constrained to act under your Honor's prior ruling.

THE COURT: I understand, yes. You have a continuing objection to these entire proceedings, both of you?

MR. JAFFE: Your Honor, with regard to the other basis raised by the witness with regard to his religious objection, the religious objection is almost in haec verba

[illegible] and determined to

be insufficient, affirmed by the Second Circuit in the First Smilow case by Judge Feinberg; and we would ask the Court to instruct the witness with regard to his religious bases that in fact he has no religious basis on which he may decline to answer questions under the First Amendment.

THE COURT: Yes. You understand that so far as your assertion of a privilege, whether it be constitutionally based or religiously based, I do not find that that is an appropriate reason for refusing to answer proper questions, and I should direct you to answer such questions as I deem proper.

THE COURT: I think the record should indicate

[illegible] which I [illegible]

has been pursuant to the authority set forth in Title 18

be insufficient, affirmed by the Second Circuit in the First Smilow case by Judge Feinberg; and we would ask the Court to instruct the witness with regard to his religious bases that in fact he has no religious basis on which he may decline to answer questions under the First Amendment.

THE COURT: Yes. You understand that so far as your assertion of a privilege, whether it be constitutionally based or religiously based, I do not find that that is an appropriate ground for refusing to answer proper questions, and I should direct you to answer such questions as I deem proper.

MR. JAFFE: With regard to the refusal to answer based upon his indictment or his plea to arson in the New York State Court, we would ask that this exhibit be marked Exhibit 5, Court Exhibit 5 for the Court to take judicial notice of the fact that the witness has on November 27, 1972 entered a plea of guilty to an E Felony for the arson he was charged with, and that his refusal to testify based on any type of Fifth Amendment ground is covered by the immunity that the Court has just conferred upon him.

(Court Exhibit 5 marked.)

THE COURT: I think the record should indicate

U. S. Code, Section 6003.

MR. JAFFE: With regard to his other basis for refusing to testify--

THE COURT: Just a moment. 6002 is the order thatI made. In any event you understand that now immunity has been conferred upon you, do you not?

A Yes.

MR. JAFFE: With regard to his other basis, your Honor, the witness refuses to answer based on two assertions one that he has been placed in double jeopardy in that he was on a previous occasion held in contempt for refusing to testify. We ask the Court to instrut him that that is an insufficient basis for refusing to now testify before a hearing held in front of the Court.

THE COURT: I so instruct the witness.

MR. JAFFE: With regard to his refusal to answer based on the discovery of this witness by the existence of tapes which led to the discovery of the witness Sheldon Seigel, we would ask the Court to instruct him that that too is no basis on which he may refuse to testify.

THE COURT: Yes, the witness is so instructed.

BY MR. JAFFE:

Mr. Siegel, [illegible] 26

1972, did you on that date meet with Sheldon Davis, and

Murray Elbogen, Jerome Cellerkraut, and Richard Huss?

THE COURT: You need not read the entire thing, Mr. Smilow. You may say "same declination" if that is what you want to do.

A Same declination?

MR. PIERCE: I didn't hear the answer.

THE COURT: He said "same declination".

MR. JAFFE: Would the Court direct the witness to answer that question.

THE COURT: I order you to answer that question.

THE WITNESS: Same declination.

Q Mr. Smilow, who did you prior to January 26, 1972 have any conversations with Stuart Cohen or Sheldon Davis concerning your agreement with them to take an attache case to the premises of Columbia Artists Management, Inc. to there ignite a fuse contained in that attache case and in fact on the 26th?

THE COURT: Mr. Jaffe, don't tell a story. Just read a lawyer-like question, please.

MR. JAFFE: Let me withdraw the question.

Q Prior to January 26, 1972, did you have a conversation or conversations with Sheldon Davis and with Stuart Cohen concerning your [illegible] to Columbia Artists Management?

A Same Declination.

THE COURT: I order you to answer, sir.

THE WITNESS: Same declination.

Q As a result of that conversation, or any conversations, did you on the 26th of January 1972 go with certain individuals in a car from Brooklyn to Manhattan?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same.

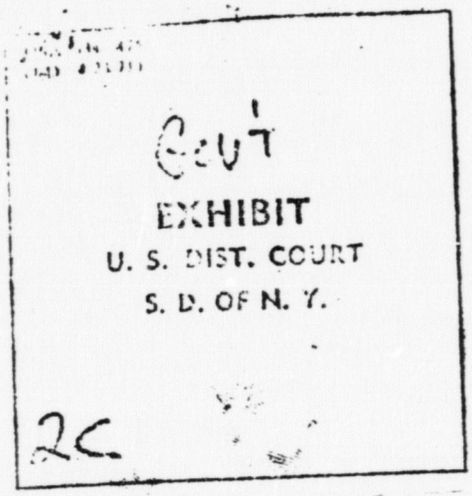
Q Did you on the 26th of January 1972 go with an individual to the premises of Columbia Artists Management?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

THE COURT: I think that is enough, Mr. Jaffe. Why don't you ask him one question to the effect as to whether or not he intends to decline on these grounds?



BY MR. GRIM:

Q Directing your attention to the month of June 1972, Mr. Smilow, did you have any conversations with Sheldon Seigel?

A Same declination.

THE COURT: What did you say?

THE WITNESS: Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same.

Q Mr. Smilow is ityour intention that to any other questions that I put to you that you will give the same declination and refuse to answer?

MR. SIMPSON: I object to that your Honor as not being part of the cross-[illegible].

THE COURT: Overruled.

Q Sir?

THE COURT: Answer it?

THE COURT: You decline to answer whether you will continue to answer?

THE WITNESS: I will answer the same way.

THE COURT: You will answer the same way. All right.

MR. SMILOW: At this time, your Honor, the Government would ask the Court under Title 28, Section 1826A to find that this witness is in contempt of Court and the Government's motion is that the Court order he be remanded to the custody of the attorney general for the duration of this proceeding until such time as he gives testimony before this Court.

THE COURT: Mr. Smilow, I want to explain something to you.

I am about to hold you in civil contempt. That means that I am going to order that you be placed in the custody of the Attorney General for the duration of the trial unless in the interim, in the meanwhile you indicate your willingness to answer the questions you have declined to answer today.

Do you understand?

THE WITNESS: I [illegible]

THE COURT: That is civil contempt, and the [illegible]

of civil contempt is to induce you to break your silence.

There is another kind of contempt which is called criminal contempt, which has as its purpose punishment for the crime of contempt. The two are not exclusive. Do you understand what I have just told you?

THE WITNESS: Yes.

THE COURT: All right, Mr. Sutton. The Court finds you in civil contempt and it is the order of the Court that you be committed to the custody of the Attorney General for the duration of the trial or until such time as you answer the questions which you have declined to answer today.

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S. D. OF N. Y.
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R I C H A R D H U S S, having been duly affirmed, testified as follows:

DIRECT EXAMINATION

BY MR. JAFFE:

Q Mr. Huss, do you know an individual named Sheldon Davis?

A The Court of Appeals has ruled that my prior refusal to answer questions in this proceeding on the grounds that to answer any questions would be a severe violation

of the teachings of my religion and cannot be recognized by an American court as a basis for not testifying. With all due respect to the decision of the Court of Appeals and of the honorable tribunal, I find that the cardinal precepts of my religion must take precedence in my mind. Therefore I respectfully decline to answer any questions on the religious principles stated in my prior declinations before this honorable tribunal.

THE COURT: I direct you to answer. I order you to answer.

THE WITNESS: Same declination.

MR. JAFFE: Excuse me just a minute, Judge.

THE COURT: Before this goes any further, Mr. Huss, I want to tell you something: I explained the last time that your failure to answer questions when I have ordered you to answer constituted contempt of court. I told you that my having committed you for civil contempt does not preclude the bringing of charges of criminal contempt against you.

I again want to advise you of that and I want to make other things abundantly clear to you, Mr. Huss.

One, I am going to ask the United States Attorney to comply with the provisions of Rule 42B and proceed against you for criminal contempt if you persist in your refusal to

answer. I for one regard your refusal to answer as criminal contempt.

I want further to advise you, Mr. Huss, that for criminal contempt there is no limit upon the amount of punishment which can be imposed upon you for that crime. Is that clear?

THE WITNESS: Yes, your Honor.

Q Mr. Huss, do you know an individual named Stuart Cohen?

A Same declination.

MR. JAFFE: Would your Honor direct the witness?

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Do you know an individual named Murray Elbogen?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Do you know an individual named Jeffrey Smilow?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Do you know an individual named Sheldon Seigel?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same.

Q Do you know an individual named Jerome Zellerkraut?

THE COURT: Yes?

MR. ZWEIBON: Your Honor, I think we have gone --

THE COURT: I don't think so. Go ahead.

Q Do you know an individual named Jerome Zellerkraut?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Directing your attention to the 25th of January, 1972, did you see Sheldon Davis, Stuart Cohen, Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Zellerkraut?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Directing your attention to the 26th of January, 1972 did you see Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Zellerkraut?

A Same declination.

THE COURT: I want to again advise you that your refusal to answer these questions over my order constitutes in my view criminal contempt of court, and I want you to have that in mind.

I now order you to answer.

THE WITNESS: Same declination.

Q Directing your attention , Mr. Huss, to the morning of January 26, 1972, would you tell the Court who you saw, that is, what persons you saw on that morning?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

MR. MILLER: Excuse me, your Honor. The witness has made it clear in my mind that he will not answer. I see no purpose in this continuing.

Q Mr. Huss, on the morning of January 26, 1972 did you go in a motor vehicle with Sheldon Davis, with Jeffrey Smilow and Murray Elbogen and with Jerome Zellerkraut and drive in an automobile from Brooklyn to Manhattan?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Had youprior to the morning of January 26, 1972 agreed with Sheldon Davis and Stuart Cohen that you and Jerome Zellerkraut would go to the offices of Sol Hurok?

A Same declination.

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled, same order. I order you to answer.

THE WITNESS: Same declination.

Q Mr. Huss, did you on the morning of January 26 deliver any attache case along with Jerome Zellerkraut to the offices of Sol Hurok?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

THE COURT: I again advise you that your continued refusal to answer these questions over my direction constitutes criminal contempt of court.

Go ahead.

Q Mr. Huss, prior to the morning of January 26, 1972 or on themorning of January 26, 1972 did you have any discussions with Sheldon Davis, Stuart Cohen, Sheldon Seigel, Jerome Zellerkraut, Murray Elbogen or Jeffrey Smilow about

carrying an attache case to the offices of Hurok Concerts, Incorporated?

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled.

Answer, please.

THE WITNESS: Same declination.

THE COURT: I direct you to answer.

THE WITNESS: Same declination.

Q Mr. Huss, were you ever part of any plan to deliver any incendiary devices to either Hurok Concerts, Incorporated or Columbia Artists Management on the morning of January 26, 1972?

MR. SLOTNICK: I object to the form of the question.

THE COURT: Overruled.

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

MR. JAFFE: Your Honor, may I have a moment?

THE COURT: Yes.

(Pause.)

THE COURT: I want the record to indicate at this point that immunity has been conferred upon this individual

previously.

Are you aware of that, Mr. Huss?

THE WITNESS: Yes.

THE COURT: And you have been aware of that all morning, have you not?

THE WITNESS: Yes, your Honor.

MR. ZWEIBON: If your Honor please, for the sake of the record I don't want to pop up everytime with this type of objection and --

THE COURT: You may rise every time you have an objection to make.

MR. ZWEIBON: So that we will make it in duet.

THE COURT: What is on your mind?

MR. ZWEIBON: The same things, the leading of the witness, the matter of form, the length of this type of interrogation.

THE COURT: Overruled.

Q Mr. Huss, on the morning of January 26, 1972 did you leave an incendiary device contained in a black attache case in the offices of Sol Hurok, Hurok Concerts, Incorporated?

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

Q Mr. Huss, on the morning of January 26, 1972 at around 9:30 did you meet in Manhattan with Jerome Zellerkraut, Jeffrey Smilow and Murray Elbogen?

MR. SLOTNICK: I object to the form of the question as not being binding on my client.

THE COURT: Overruled.

MR. ZWEIBON: Same objection.

THE COURT: Overruled.

A Same declination.

THE COURT: I order you to answer.

THE WITNESS: Same declination.

MR. JAFFE: At this time the government would ask the Court, pursuant to Rule 42B, to orally notify this witness that he is to be held in criminal contempt pursuant to Rule 42B and Sections 401 and 402 of Title 18, United States Code?

We would state to the Court that we are at this time ready to proceed forthwith with a trial for criminal contempt of the witness Richard Huss.

THE COURT: I want to tellyou, Mr. Huss, as I have throughout your examination this morning, that your failure to answer the questions put to you constitutes in my judgment criminal contempt.

However, so far as the United States Attorney

is concerned, because of the seriousness of this criminal contempt, I think that the United States Attorney should proceed on papers as indicated in Rule 42 B, namely, that part "or on application of the United States Attorney by an order to show cause or an order of arrest."

You have made the application and since you make the application I ask you to comply with Rule 42B and proceed by order to show cause or an order of arrest so that the order to show cause, to be perfectly frank with you, will specify in writing for this man what it is he is facing. Obviously this proceeding will be a jury proceeding.

MR. JAFFE: That is correct.

THE COURT: Because it is inconceivable to me that anybody would be thinking of proceeding in a manner that would limit punishment, if this man is guilty, to six months, and therefore I want every letter observed. I want him proceeded against in writing. I want the case to proceed to a jury trial and I want the Judge, whoever he is, to have in mind my views as I have expressed it and previously this morning of the seriousness with which I view the frustration of a murder prosecution. People may do that, but the law will make them pay.

MR. JAFFE: Your Honor, with regard to Rule 42B the government would ask that -- and we wil comply with

your Honor's direction to proceed on papers, but the government would ask that since under Rule 42B notice can be given orally by the Judge in open court in the presence of the defendant, and he will be a defendant, being cited for criminal contempt.

THE COURT: I have so notified him, it seems to me, several times.

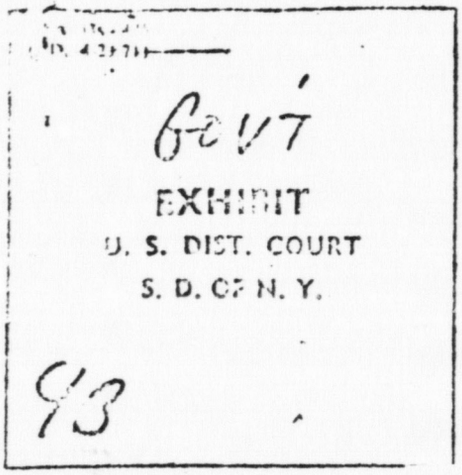
If he has misunderstood me I so notify him now.

You will be a defendant in a criminal contempt proceeding. That is clear, isn't it, Mr. Huss?

THE WITNESS: Yes, it is.

GOV'T
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
4A

JEFFREY SMILOW, called as a witness in behalf of the government, was duly affirmed, and testified as follows:



THE COURT: I have read that.

Let me ask you, Mr. Smilow, are you prepared to answer the questions which you refused to answer at the last session?

THE WITNESS: No.

and whether or not it is tainted.

THE COURT: I decline to do so. I am not even going to ask him anything today other than the fact that he would persist in his refusals to answer. Beyond that I think the record is sufficient to proceed against him, as I warned him the last time, for criminal contempt, and the United States Attorney advises me that he is going to do it based on the record the last time at which you made no such request.

Then if you want to take it up with the trial judge, whoever it may be, in his criminal contempt case, that may be the place to do it. But for now I believe, and I advise you, sir, that your failure to answer questions which you are now looking at at the last session which you were called upon to testify constitutes criminal contempt of court and that the punishment for criminal contemtp is without limit.

Is that clear?

THE WITNESS: Yes.

MR. LEIGHTON: Is your Honor going to allow the United States Government to ask of Mr. Smilow questions concerning this record?

THE COURT: No, the record is clear.

MR. PUTZEL: I think the record is perfectly

clear and I think Mr. Smilow has answered that he persists in his contemptuous refusal to answer questions and, accordingly, pursuant to Rule 42B of the federal rules of criminal procedure we will move this court through an order to show cause on papers to have Mr. Smilow cited for criminal contempt.

I would ask the Court to inquire of Mr. Smilow whether he was in court just previous to this during the time when Mr. Huss was advised by the Court of the consequences of refusal to testify.

THE COURT: Were you here when I dealt with Mr. Huss a few moments ago; were you in the courtroom?

THE WITNESS: Yes.

THE COURT: You heard the entire --

THE WITNESS: Yes.

THE COURT: -- situation, all the questions and everything I said to Mr. Huss?

THE WITNESS: Yes.

THE COURT: All right.

MR. PUTZEL: Our application is that Mr. Smilow be arrested and that bail be fixed in the amount of $50,000.

THE COURT: I will hear you.

MR. LEIGHTON: Your Honor, on the question of

('363)

U.S. DISTRICT COURT
FILED
JUL 31 1974
S. D. OF N. Y.

UNITED STATES OF AMERICA	:	
-v-	:	
RICHARD HUSS,	:	
Defendant.	:	73 Cr. Misc. 24 (TPG)
----------x		73 Cr. Misc. 25
UNITED STATES OF AMERICA	:	
-v-	:	JUDGMENT AND ORDER
JEFFREY H. SMILOW,	:	
Defendant.	:	
----------x		

1. On June 27, 1973 the Hon. Arnold Bauman, United States District Judge, having previously held the defendants Richard Huss and Jeffrey H. Smilow in civil contempt of court, directed the United States Attorney for the Southern District of New York to proceed against the said defendants on the charge of criminal contempt of court for their having knowingly and wilfully refused to obey lawful orders of the Court requiring the said defendants to testify under grants of immunity at the trial of United States v. Stuart Cohen and Sheldon Davis (72 Cr. 778).

2. This proceeding commenced on June 28, 1973 at which time Judge Bauman signed certain orders requiring each of the said defendants to show cause why he should not be adjudged in criminal contempt of court for his wilful refusal to answer questions put to him at the trial of United States v. Stuart Cohen and Sheldon Davis (72 Cr. 778).

3. On July 15, 1974 the trial of this matter commenced before the Hon. Thomas P. Griesa and a jury. On July 16, 1974 the jury found the defendants Huss and Smilow guilty of criminal contempt of court;

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Richard Huss and Jeffrey Smilow be, and hereby are, remanded to the custody of the Attorney General or his duly authorized representative for a period of one (1) year, service of the said sentence to commence on August 5, 1974 at 10:00 a.m. at which time the said defendants shall surrender themselves at Room 506, United States Courthouse, Foley Square, New York, New York.

Dated: New York, New York

July 31, 1974.

IT IS SO ORDERED.

Thomas P. Griesa

THOMAS P. GRIESA
United States District Judge

(365)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	74 Crm. Misc. 24 and 25
-against-	NOTICE OF APPEAL
RICHARD HUSS and JEFFREY SMILOW.	

Notice is hereby given that Richard Huss and Jeffrey Smilow, defendants above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment of the District Court for the Southern District of New York convicting the defendants of criminal contempt of court and sentencing them to serve one year in prison, entered in this action on the 31st day of July, 1974.

Dated:
New York, New York
August 2nd, 1974.

Paul G. Chevigny
84 Fifth Avenue
New York, New York 10011

Attorney for Defendants

(366)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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